Supreme Court, U.S.
FILED

97 956 DEC 9 1997

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LUFTHANSA GERMAN AIRLINES,

Petitioner,

vs.

LEONARD KRYS AND REBECCA KRYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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90 pp

QUESTIONS PRESENTED

1. Where an airline passenger suffers a heart attack during a flight and the damage to his heart wall is aggravated by the negligence of the crew, does the aggravation constitute an "accident" under the Warsaw Convention, a treaty of the United States?

2. In this case which occurred during an international flight over the high seas, should general maritime law govern issues which are not covered by the Warsaw Convention?

PARTIES TO THE PROCEEDINGS BELOW

The parties before the Court and to the proceedings below are:

1. Petitioner Lufthansa German Airlines

2. Respondents Leonard Krys and Rebecca Krys

CORPORATE AFFILIATIONS

1. Deutsche Lufthansa A.G. doing business as Lufthansa German Airlines has no corporate parents, subsidiaries, or affiliates the shares of which are publicly traded in the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Lufthansa German Airlines, ("Lufthansa") requests that a writ of certiorari issue to review the final judgement of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Court of Appeals' August 25, 1997 opinion affirming the district court's judgement (App. 4.) is officially reported at 119 F.3d 1515 (11th Cir. 1996) and can be found at 1997 WL 450150.[1]

The district court's October 24, 1995 findings of fact and conclusions of law (App. 39.) are neither reported nor published.

The district court's December 17, 1994 Order and opinion denying Lufthansa's motion for partial summary judgement (App. 57.) is neither reported nor published.

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[1] References to the Appendix are preceded by App. .

JURISDICTION

The judgement of the court of appeals was entered on August 25, 1997; petitioner's petition for rehearing and suggestion of rehearing *en banc* was denied on November 7, 1997. App. 1. The jurisdiction of the Court is evoked under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Warsaw Convention,[2] Article 17 of Chapter III, Liability of the Carrier, provides:

> The Carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damaged so sustained took place on board the aircraft or in the course of any of the operations of

---

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12,1 929, 49 stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted* in 49 U.S.C. § 40105 (1997) (note).

embarking or disembarking.

49 Stat. 3018.

STATEMENT OF THE CASE

A. Nature of the Case

While on a flight over the Atlantic Ocean from Florida to Germany, Respondent Leonard Krys, became ill. A doctor on board examined the plaintiff and cold the flight attendants that there was no need to make an emergency landing. Plaintiff never requested a landing. Shortly before landing at Frankfurt, the doctor noticed that the symptoms had changed and informed the crew that plaintiff was suffering a heart attack. Plaintiff recovered and sued Lufthansa. He claimed that the Lufthansa crew was negligent in not realizing that the doctor's advice was wrong; and negligent for not making an emergency landing, contrary to the doctor's advice. Plaintiff did not sue for any damage caused by the heart attack itself. Rather, he claimed that the crew's negligence proximately caused a permanent aggravation of the injury to his heart wall. Lufthansa defended on the basis, among others, that the alleged acts constituted an "accident" and that the Warsaw

Convention limited its liability.[3]

B. The Warsaw Convention

The Warsaw Convention is a multilateral treaty to which the United States has adhered since 1934. Since the Convention "is by far the most widely adopted treaty concerning private international law and after the United Nations Charter one of the most widely adopted of all treaties" (A. Lowenfeld, Aviation Law § 4.1, at 7-98 (2d Ed. 1981)), its significance to the aviation industry as well as its importance within the multilateral treaty system is beyond dispute. As a treaty of the United States, the provisions of the Warsaw Convention are the supreme law of the land. U.S. Const. Art. VI, cl. 2; *Air France v. Saks*, 470 U.S. 392, 406 (1985). The term "accident" should be "flexibly

---

3 Since the occurrence of these events, Lufthansa as well as many of the world's major airlines have agreed to be strictly liable for damages caused by Warsaw Convention accidents for up to 100,000 Special Drawing Rights (approximately U.S. $145,000) and to be presumptively liable for damages caused by Warsaw Convention accidents above that amount without limitation. International Air Transport Association: Agreement Relating to Liability Limitations of the Warsaw Convention, approved by Department of Transportation Order 97-1-2, 1997 WL 4834 (D.O.T. Jan. 8, 1997).

applied" and has been interpreted "broadly enough to encompass torts committed by terrorists or fellow passengers." *Saks*, 470 U.S. at 405.

C. The Proceedings Below

Respondents sued Lufthansa in the United States District Court for the Southern District of Florida. The basis of jurisdiction was 28 U.S.C. §§ 1332 and 1605. They alleged that Lufthansa was negligent in failing to take adequate measures to determine Mr. Krys' medical condition which caused or aggravated his preexisting condition proximately causing further bodily injury.

Lufthansa moved for partial summary judgement on the grounds that an allegation of crew negligence, proximately causing an aggravation of the injury to plaintiff's heart wall, constituted an "accident" under the Warsaw Convention, and that plaintiff's damages were limited to $75,000. Lufthansa's motion was denied. App. 57.

A non-jury trial followed before Magistrate Judge Linnear Johnson. Because Judge Hurley had previously ruled that the Warsaw Convention was not applicable to this case, Magistrate

Judge Johnson tried the case pursuant to local law.

Lufthansa argued in its proposed findings of facts and conclusions of law that pursuant to general maritime law Lufthansa was not liable for following the advice of a trained physician on board who examined the plaintiff and advised Lufthansa that there was no need to make an emergency landing.

Judge Johnson's findings of fact stated that Lufthansa's negligence proximately caused significant damage to plaintiff's heart wall. App. 39-52. Lufthansa was adjudged liable to plaintiffs for compensatory damages in the amount of $2,400,000. App. 52-53. The Court dismiss-ed plaintiffs' claim for punitive damages App. 53.

Thereafter, the parties stipulated that, if attorneys' fees were recoverable, the amount of the fees would be $350,000.

On appeal, the Eleventh Circuit held that the cause of the aggravation of plaintiff's injury was not the doctor's advice to the crew that it was not necessary to land, nor was the cause the negligence of the Lufthansa crew. Rather, the cause of plaintiff's

injury was "the continuation of the flight and the resultant delay in hospitalization." App. 14-15 n. 10. The Eleventh Circuit then determined that while the cause of plaintiff's injury was a perfectly normal flight, Lufthansa was still liable under local law in an amount of approximately $2.75 million.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a direct conflict among the highest court of the State of New York, and the Third and Eleventh Circuit Courts of Appeals as to whether, pursuant to the Warsaw Convention, crew negligence proximately causing an aggravation of a preexisting health related injury constitutes an "accident," thereby assuring the application of the treaty to the facts of the case.

Certiorari should be granted also to clarify this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), which the Eleventh Circuit misconstrues and is in apparent conflict. This conflict is important and recurring with several decisions in the lower courts, a current pending case, a large number of similar happenings which occur each year, and a case now on

petition before this Court which is awaiting the views of the Solicitor General to be filed.

The practical result of the decision below is to exclude from application of the Convention's coverage a significant type of case involving an airline's liability for negligently caused bodily injuries to its passengers. By this partial abrogation of the treaty, the Eleventh Circuit ignores its responsibilities to enforce the treaties of the United States.

I

THE DECISION OF THE ELEVENTH CIRCUIT BELOW AND THAT OF THE THIRD CIRCUIT DIRECTLY CONFLICT WITH A DECISION OF THE HIGHEST COURT OF THE STATE OF NEW YORK AND REWRITE A SIGNIFICANT PROVISION OF THE TREATY

As the panel admits (App. 16. n.11), *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (2d Dep't), *aff'd mem.*, 57 N.Y.2d 767, 454 N.Y.S.2d 991 440 N.E.2d 1339 (1982), directly conflicts with the decision of the court below on this issue of federal law. *Seguritan* is on

all fours with Lufthansa's position and stated:

> The "accident" is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of the defendant's employees to render her medical assistance.

86 A.D.2d at 658, 446 N.Y.S.2d at 398.

In direct conflict with *Seguritan*, the Eleventh Circuit concluded that the alleged aggravation of plaintiff's condition by the negligent failure of Lufthansa's employees to render him medical assistance was not an "accident." Rather, there was no accident because the cause of the aggravated injury was sitting on a perfectly normal flight. In the words of the court below:

> [I]f in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, [10] then it seems clear that the aggravation injury arises not from an "unexpected or unusual

> happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."
>
> 10. We identify this as the relevant event by asking what precise event or events allegedly caused the damage sustained by the plaintiff. In the instant case, it is clear that if the plaintiff suffered damage as a result of any external event, that event was the continuation of the flight and the resultant delay in hospitalization.

App. 14-15.

The error in the Eleventh Circuit's analysis is that this was not the normal operation of the aircraft. Crew negligence is not normal or expected. Had the aircraft been operated in the normal way it would have made an emergency landing. How is crew negligence aggravating the damage of a sick passenger's heart wall legally different from crew negligence causing hot coffee to spill on a well passenger's lap? Even the Eleventh Circuit indicated doubt about its own

analysis.

> This conclusion is not unassailable: as we suggested above, it is at least arguable that where injury is caused by crew negligence, the injury arises from an "unexpected or unusual event or happening external to the plaintiff."

App. 14.

Furthermore, if the *cause* of the aggravation injury was not the negligence of the crew, than the lawsuit should have been dismissed instead of holding Lufthansa liable for $2.75 million.

The Eleventh Circuit may have been led into error by following the law as applied by the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984), also in direct conflict with *Seguritan*. The Third Circuit applied the same faulty analysis in the analytically identical case of a passenger who became ill during a flight and alleged that crew negligence aggravated a hernia condition. The Third Circuit held, prior to this Court's decision in *Saks*, that "aggravation of a pre-existing injury during the course of a routine

and normal flight should not be considered an "accident... ." *Abramson*, at 133. "[T]he alleged acts and omissions of JAL and its employees during the routine flight on which Abramson was a passenger do not constitute an "accident... ." Id. *Abramson* did not refer to the conflicting *Seguritan* decision.

This erroneous interpretation, contrary to the text of the treaty and the intent of its drafters, is resulting in an enlarging loophole in the application of Article 17. This result is particularly undesirable where the main purpose of the Convention is to avoid the application of conflicting national laws by establishing uniform rules concerning air carriers' liability. It also directly conflicts with *Seguritan* and with this Court's interpretation of an Article 17 "accident."

II

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DEFINITION OF "ACCIDENT" AS CONTAINED IN ARTICLE 17 OF THE WARSAW CONVENTION AND PRESENTS AN IMPORTANT AND RECURRING ISSUE

A. The Decision Conflicts With This Court's Decision in *Saks*

The Eleventh Circuit misconstrued this Court's decision in *Air France v. Saks*, 470 U.S. 392 (1985), and their decision is in conflict with it. *Saks* concerned "whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system [where no person was alleged to have been negligent] is an 'accident' within the meaning of Article 17 of the Warsaw Convention... ." Id. at 395. Examining the text of the Convention, this Court concluded that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." Id. at 405. It explained that the "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."

Id.

This Court also emphasized that "[a]ny injury is the product of a chain of causes, and we require only that the passenger be able to prove that *some link in the chain* was an unusual or unexpected event external to the passenger." Id. at 406, emphasis supplied. As found by the court below, the injury to plaintiff's heart wall did not result solely from the state of his health. Moreover, the negligence of the crew must have been "some link in the chain" of causation of plaintiff's injury. Had the crew's negligence not been "some" causal link, Lufthansa could not have been held liable.

But the court below did not follow *Saks*. Instead, it chose to follow the conflicting rule of *Abramson v. Japan Airlines, Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984), a pre-*Saks* case. Without precedent or analysis, *Abramson* held that while negligently injuring a well passenger constituted an accident, negligently injuring a sick passenger, by aggravating his injury, did not constitute an accident. The *Abramson* analysis, of course, directly conflicts with *Saks*.

Adding to the confusion, the court below based its conclusion, in part, on *Saks'* description of *Abramson*, which the Eleventh Circuit interpreted to be this Court's endorsement of the *Abramson* rule that negligent aggravation of a passenger's health related injury is not an "accident." As stated by the Eleventh Circuit:

> In particular, we note that in summarizing the *Abramson* decision in a parenthetical, the Court described the relevant event as "sitting in an airline seat during normal flight" notwithstanding the fact that the plaintiff had attempted to make out the Warsaw Convention claim based on the airline's "acts or omissions"-i.e. its negligence. *Air France*, 470 U.S. at 405... .

App. 15.

The reliance of the court below on this *Saks* passage is misplaced and taken out of context. *Saks* was emphasizing "routine travel procedures that produce an injury due to the particular internal condition of the passenger," in that part of the decision. *Saks*, 470 U.S. at 405. The issue of negligently causing an aggravation of a health related injury was not involved

in *Saks*, and the Court made no reference to that part of the *Abramson* decision which erroneously concluded that "the acts and omissions of JAL and its employees during the routine flight," do not constitute an "accident... ." *Abramson*, 739 F.2d at 133.

Either the negligence of the airline constitutes an accident and the airline is liable, or that negligence is not an accident and the airline is not liable. Granting *certiorari* would clarify *Saks* and correct the conflicting rulings of *Abramson* and the court below. Unfortunately, *Abramson* has been widely adopted by a growing number of courts and quickly should be put to rest.

B. This Decision Presents an Important and Recurring Issue

In addition to this case, several lower courts have also embraced *Abramson*, even after *Saks*, with the result that the "accident" aspect of Article 17 has been written out of the treaty in cases involving health related injuries aggravated by crew negligence. See, *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064 (N.D. III (1985) (following *Abramson*, post heart attack crew negligence does not

constitute an accident); *Tandon v United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996) (same); *Northern Trust Co. v. American Airlines, Inc.*, 142 III. App. 3d 21; 491 N.E.2d 417 (1985) (same). Moreover, the same issue is pending in *McDowell v. Continental Airlines, Inc.*, No. 96-7238 Civ. Gonzalez (S.D. Fla.).

Furthermore, similar cases are likely to recur. While the statistical analyses concerning in-flight medical emergencies are somewhat limited,[4] they indicate that there are a significant number of in-flight emergencies each year worldwide. And because American residents comprise a large proportion of worldwide air transportation, a significant proportion of those emergencies will involve Americans and U.S. courts.

Finally, the meaning of the term "accident" under Article 17, as well as the issue of the Convention's exclusive application, is already before this Court in the petition of *El Al Israel*

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[4] See R.O. Cummins Frequency and Types of Medical Emergencies Among Commercial Air Travelers, 261(9) Journal of the American Medical Association, p.1295-9 (March 3, 1989); World Air Transport Statistics, International Air Transport Association, Montreal Canada, p. 5.

Airlines, Ltd., v. Tseng, No. 97-475, and this Court has invited the Solicitor General to file a brief.

Certiorari should be granted to clarify whether or not the definition of "accident" includes carrier negligence which aggravates health related injuries.

III
THE DECISION CONFLICTS WITH THIS COURT'S DETERMINATION OF WHAT LAW GOVERNS ISSUES NOT COVERED BY THE CONVENTION

In *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S. Ct. 629, 636 (1986), this Court determined that where "the Convention itself contains no rule of law governing" a given question, a court should make "the normal federal disposition" and apply "that law which would govern in absence of the Warsaw Convention." *Zicherman* applied the Death on the High Seas Act because the tort, involving a death, occurred over the high seas. The court below, in conflict with *Zicherman*, applied Florida state law instead of general maritime law, even though the tort, involving an injury, occurred over the high seas.

The trial court's conclusions of law were silent on the issue of general maritime law even though two briefs by each side argued the issue.[5] Thereafter, the parties stipulated, for purposes of appeal, that the amount of plaintiffs' attorneys' fees, if recoverable, would be $350,000. In its initial brief to the Eleventh Circuit, Lufthansa argued that both general maritime law and the Convention preempted any state award of attorneys' fees, citing, *Zicherman; Sosebee v. Ruth*, 893 F.2d 54, 56 (3rd Cir. 1990) ("attorneys' fees pursuant to state statute...directly conflicts with federal admiralty law"); and *Boehringer Mannheim Diagnostics v. Pan American World Airways, Inc.*, 737 F.2d 456, 459 (5th Cir. 1984) ("the law of Texas which provides for attorneys' fees... is likewise preempted" by the Convention).

Concerning issues determined by the trial court, the Eleventh Circuit construed that the four briefs on the

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5 In 1994, Judge Hurley determined that the Warsaw Convention was not applicable. That ruling was treated as the law of the case, and in 1995 the trial proceeded pursuant to local law. Except for issues of admissibility of evidence, no law was argued at trial until the parties submitted their proposed findings of fact and conclusions of law.

issue by counsel submitted prior to the trial court's issuance of its findings of fact and conclusions of law on October 24, 1995, and the trial court's silence on the issue amounted to "a rejection [by the trial court] on the basis of untimeliness" and the court of appeals held that the issue was not fairly presented. App. 25. But the court of appeals was silent as to why it failed to follow *Zicherman* on the issue of attorneys fees which came up for the first time after the agreed judgement was entered on January 4, 1996, on appeal.

Certiorari should be granted to resolve the conflict between *Zicherman* and the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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December 1997.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-4430

LEONARD KRYS,
REBECA KRYS, his wife

Plaintiff-Appellees

versus

LUFTHANSA GERMAN AIRLINES,

Defendant-Appellant.

On Appeal from the United States District Court for the

Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__,
___F.2d____).

Before: ANDERSON and EDMONDSON, circuit Judges, and ROSENN*, Senior circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Max Rosenn, Senior U.S.Circuit Judge for the Third Circuit, sitting be designation.

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 96-4430 Krys V. Lufthansa German Airlines

DC DKT NO.: 92-02488 CV-DTKH

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

Thomas K. Kahn, Clerk

Reply To: Tramise Wilcoxson (404) 331-3336

November 7, 1997

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RE: 96-4430 Krys v. Lufthansa German Airlines

DIST. CT. NO. 92-02488 CV-DTKH

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United States Court of Appeals,

Eleventh Circuit.

No. 96-4430.

Leonard KRYS, Rebeca Krys, his wife, Plaintiffs-Appellees,

v.

LUFTHANSA GERMAN AIRLINES, Defendant-Appellant.

Aug. 25, 1997.

Appeal from the United States District Court for the Southern District of Florida. (No. 92-2488-CV-DTKH), Daniel T.K. Hurley, Judge.

Before ANDERSON and EDMONDSON, Circuit Judges, and ROSENN*, Senior Circuit Judge.

ANDERSON, Circuit Judge:

Following a three-day bench trial, a magistrate judge rendered a $2.4 million negligence judgment against defendant Lufthansa German Airlines ("Lufthansa") in favor of plaintiffs Leonard and Rebeca Krys. On appeal, Lufthansa raises challenges to both the factual findings and legal conclusions of the court below. Before turning to these challenges, we set out briefly the facts and procedural history of the case.

I. FACTS AND PROCEDURAL HISTORY [1]

On November 30, 1991, Leonard Krys ("Krys"), a 47-year-old travel agent, was a passenger on Lufthansa Flight 463, traveling from Miami to Frankfurt, Germany. Sometime in the early hours of the flight, Krys began to feel ill and contacted a flight attendant. The attendant requested that any doctors on board the plane identify themselves to the crew, and three passengers responded. After those passengers agreed that Dr. Samuel Fischmann was best suited to handle the situation, Dr. Fischmann began to tend to Mr. Krys. Precisely what symptoms either were evident to Dr. Fischmann or were conveyed to Dr. Fischmann by Krys is a matter of some dispute. Dr. Fischmann concluded after his initial examination of the patient that "there was nothing to worry about"; [2] only when the flight was over Amsterdam did Dr. Fischmann become convinced that Krys might be having a heart attack. However, the magistrate judge found that Mr. Krys "suffered the symptoms of a cardiac infarction, as described by the American Medical Association and Lufthansa's Manual, ... within the first one and one-half to three hours of the ten hour flight...." Although the plane's flight path kept it close to the east coast throughout the first one to three hours of the flight, the

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* Honorable Max Rosenn, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

[1] For our instant purposes, we need only sketch out the nature of the case; therefore, we resolve all disagreements regarding the facts in favor of the district court's findings. We resolve appellant's challenge to these findings in our discussion below.

[2] According to Dr. Fischmann's testimony, he originally believed Krys had too much to drink. When the pain did not subside with time, he began to suspect that Krys was experiencing angina pains.

crew—ostensibly relying on Dr. Fischmann's opinion—did not make an unscheduled landing. Upon landing in Germany, the plane was met by an ambulance which transported Krys to a hospital. At the hospital, the doctors concluded that Krys had indeed suffered a heart attack.

Krys and his wife filed the instant action in the Southern District of Florida. Invoking the court's diversity jurisdiction, the plaintiffs set forth causes of action for negligence and loss of consortium. The plaintiffs' causes of action turned not on an allegation that any act or omission of Lufthansa *caused* Mr. Krys's heart attack, but instead on an allegation that Lufthansa's crew acted negligently in responding to the symptoms displayed by Mr. Krys and thus aggravated the damage to his heart. The defendants, in turn, moved for summary judgment, arguing that the plaintiffs' state law causes of action were preempted either by the Warsaw Convention or, alternatively, by the Federal Aviation Act. The district judge denied the motion, and the case was tried to a magistrate judge with the consent of the parties. After the district court rejected Lufthansa's preemption arguments, the case proceeded as a common-law negligence case.[3] The magistrate judge concluded that Lufthansa was indeed negligent and rendered a judgment for Leonard Krys in the amount of $1.8 million and for Rebeca Krys in the amount of $600,000.[4]

On appeal, Lufthansa presents the following challenges to the judgment below: (1) the plaintiffs' state law claims are preempted by the Warsaw Convention because the events that

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[3] *See* n.19 *infra*.

[4] The magistrate judge later granted a motion allowing Lufthansa a $4,699.42 set off for an insurance payment received by Krys. However, we will refer to the original sum granted as an approximation of the award.

transpired constitute an "accident"; (2) the judge erred in finding that Krys displayed the symptoms of a heart attack in the first one and one-half to three hours of the flight; (3) the judge erred in finding that Lufthansa was negligent; (4) the judge erred in finding that Krys suffered damage to his heart wall as a result of Lufthansa's negligence; and (5) the damages awarded were excessive. [5] We address each argument in turn.

II. APPLICABILITY OF THE WARSAW CONVENTION

First, we address appellant's argument regarding the applicability of the Warsaw Convention.[6] Under Article 17 of the Warsaw Convention, an international treaty binding on the United States, air carriers are liable for injuries sustained by a passenger on an international flight "if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (providing the official English translation of the governing French text). As the Supreme Court recognized in *Air France v. Saks,* 470 U.S. 392, 396, 105 S.Ct. 1338, 1341, 84 L.Ed.2d 289 (1985), "[an airline] is liable to a passenger under the terms of the Warsaw Convention only if the passenger proves that

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[5] Lufthansa makes no argument on appeal relating to preemption by the Federal Aviation Act.

[6] The Warsaw Convention is the popular name for the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in* note following 49 U.S.C.App. § 1502. For an overview of the Convention as originally enacted and a survey of the subsequent history affecting the Convention, see *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1467-1469 (11th Cir.1989), *rev'd on other grounds,* 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991).

an "accident' was the cause of her injury." In the instant case, appellant Lufthansa argues that the events that transpired on the flight in question constitute an "accident" under the terms of the Convention, and therefore, that the Warsaw Convention—including its liability limits [7] — applies and preempts the plaintiffs' state-law negligence claims.[8]

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[7] Under the terms of the Warsaw Convention as originally enacted, a carrier's liability was limited to approximately $8,300 (except in cases involving "willful misconduct"). The Montreal Agreement of 1966, a private inter-carrier agreement, raised the liability limit for international flights originating, terminating, or having a connecting point in the United States to $75,000. *See Floyd*, 872 F.2d at 1467-1469. Just last year, the Department of Transportation approved a more complicated private agreement affecting the liability limits of the Warsaw Convention. *See Tseng v. El Al Israel Airlines, Ltd.*, --- F.3d ---- (2d Cir. June 13, 1997) (summarizing the agreement).

[8] The precise preemptive scope of the Warsaw Convention is a matter of some debate. Some courts have held that where there is an "accident" within the terms of the Warsaw Convention, the Convention applies and preempts state law causes of action entirely. *See Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1482 n. 33 (11th Cir. 1989) (citing cases to this effect), *rev'd on other grounds*, 499 U.S. 530, 111 S. Ct. 1489 113 L.Ed.2d 569 (1991). We have previously held only that where there is an "accident" within the terms of the Warsaw Convention, the Convention applies and preempts *inconsistent* provisions of state law. *Id.* at 1482 (declining "to causes of action once its provisions are triggered by an "accident' within the meaning of Article 17"). Because we do not find an "accident" within the terms of the Convention, we need not address the question whether there is preemption of the entire cause of action or only of inconsistent provisions of state law.

Finally, we note that there now exists a split in the circuits as to whether the Warsaw Convention preempts state law causes of action where an incident occurs on an international flight, but does not meet the definition of "accident." Compare Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir.1984), cert. denied, 470 U.S. 1059, 105 (2d Cir. June 13, 1997) (both holding that the Warsaw Convention does not preclude alternative theories of recovery in cases where there is no covered "accident"), with Potter v. Delta Air Lines, Inc., 98 F.3d 881

Our determination of whether an "accident" occurred is guided by the Supreme Court's decision in *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). In *Air France*, the Court resolved a split in the courts of appeals regarding the proper definition of the term "accident" as used in the Warsaw Convention. After examining the text of the Convention, its negotiating and subsequent history, and the weight of precedent in the

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(5th Cir. 1996) (finding preemption even in the absence of an "accident"). Both at oral argument and in a post-argument letter brief on an entirely different question, Lufthansa has attempted, somewhat circuitously, to invoke the argument accepted by the Fifth Circuit (hereinafter called the "total preemption argument"). We decline to entertain this argument for the following reasons. First, we think it is clear that Lufthansa abandoned this argument in the court below. Lufthansa's motion for summary judgment presented, in effect, a total preemption argument: Lufthansa argued that the Warsaw convention applied because the incident occurred on an international flight; that state-law causes of action were thus preempted; and that Lufthansa was not liable under the Convention because there was no covered "accident." However, after plaintiffs submitted an opposition citing the overwhelming contrary case law, Lufthansa appeared to shift gears completely. In its reply to plaintiffs, Lufthansa asserted only that if there were indeed crew negligence, as the plaintiffs asserted, such negligence would constitute an "accident" and thus bring the case within the purview of the Convention. In other words, Lufthansa appeared to abandon the total preemption argument in favor of the more modest preemption argument that turns on the presence of an "accident". The court below rejected the airline's preemption argument, characterizing the argument as the more modest version. The airline interposed no objection to the court's characterization of the preemption argument, and thereafter the case proceeded as a state law claim. On appeal, Lufthansa did not present the total preemption argument either in its initial brief or in its reply brief; instead, Lufthansa only raised the argument assuming the presence of an "accident." Dual concerns of efficient administration and fairness to the opposing party persuade us not to entertain the total preemption argument in the instant case.

Convention's signatory countries, the Court rejected the argument that "accident" means "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of the flight and all such persons have disembarked." *Id.* at 396, 105 S.Ct. at 1340. Instead, the Court held that an "accident" is properly defined as "an unexpected or unusual event or happening that is external to the passenger." *Id.* at 405, 105 S.Ct. at 1345. The Court then applied this definition to the case before it, which presented the question whether a loss of hearing caused by normal operation of the aircraft's pressurization system constitutes an "accident" within the meaning of Article 17. The Court answered this question in the negative, saying that "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident." *Id.* at 406, 105 S.Ct. at 1345.

Lufthansa urges us to hold that a negligent response to a passenger's heart-attack symptoms constitutes an "accident" under the terms of *Air France*. In its view, aggravation of a preexisting condition due to crew negligence is *ipso facto* an injury caused by an "unexpected or unusual event ... external to the passenger." This argument has some intuitive appeal: the response of the crew to the passenger's situation is external to the passenger, and deviation from the normal standard of care is at least arguably "unexpected" or "unusual." As further support for their argument that the conduct alleged in the instant case constitutes an "accident," Lufthansa cites the pre-*Air France* case of *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (N.Y.App.Div.1982), *aff'd*, 57 N.Y.2d 767, 454 N.Y.S.2d 991, 440 N.E.2d 1339 (1982) (mem.). In *Seguritan*, the court answered the question we are presented with today as follows:

> The incident in question is clearly an "accident" within the meaning of article 17. The "accident" is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance. This is somewhat analogous to the hijacking cases where the "accident" which caused the injury is not the act of the hijackers but the alleged failure of the carrier to provide adequate security....

Thus, this case falls squarely within the terms and conditions of the Convention. *Id.* 446 N.Y.S.2d at 398-99.

Plaintiffs, on the other hand, urge us to hold that there was no "accident" within the terms of the Warsaw Convention. In the plaintiffs' view, the instant case falls within the category of cases the Supreme Court described in *Air France* as not involving an "accident": cases in which "the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Air France,* 470 U.S. at 406, 105 S.Ct. at 1345. Relying on numerous cases holding that aggravation of pre-existing injuries due to inadequate care does not constitute an "accident" within the meaning of the Convention, the plaintiff argues that "the dispositive focus [of the accident inquiry] ... is upon the event or the chain of events which caused the *initial* injury"—in this case, the heart attack. Because there has never been an allegation that the heart attack itself was caused by an "unexpected or unusual event external to the passenger," the plaintiff argues that there can be no "accident" involved in this case.

We turn, then, to the case law in plaintiffs' favor. In *Scherer v. Pan American World Airways, Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580 (N.Y.App.Div.1976), the plaintiff brought an action under the Warsaw Convention, alleging

that sitting in an airline seat on one flight had caused him thrombophlebitis and sitting in an airline seat on another flight had aggravated that condition. Having noted that "[t]he planes were concededly not involved in a collision, nor was there any turbulence during the flights," the court held that there was no accident that would bring the suit within the terms of Article 17. In *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3d Cir.1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985), the plaintiff suffered an attack from a pre-existing periesophageal hiatal hernia while traveling from Anchorage to Tokyo. When plaintiff's wife asked the stewardess for a place where plaintiff could lie down and employ a self-help remedy involving massaging his stomach and sometimes inducing vomiting, the stewardess responded that there were no empty seats. Discovery, however, revealed that there were nine empty seats in first class. Plaintiff sued the airline, claiming, *inter alia*, that the airline had been negligent. In support of his argument that the aggravation of his injury by JAL's acts and omissions constituted an "unusual and unexpected happening" and, thus, a Warsaw Convention "accident," plaintiff analogize his case to cases involving terrorist attacks, hijackings, and bombings (which other courts had found constituted "accidents"). Applying its "unusual or unexpected happening" test, the Third Circuit rejected the plaintiff's arguments:

> We are not persuaded that the situations are analogous. In none of those cases was the injury suffered during the course of a routine and normal flight, as here. In the absence of proof of abnormal external factors, aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an "accident" within the meaning of Article 17. *See Warshaw v. Trans World*

> *Airlines*, 442 F.Supp. at 413 (no "accident" where plaintiff's respiratory infection became aggravated during the flight, resulting in permanent hearing loss in one ear, because of a change in cabin pressure which is part of the normal flight procedure).

Id. at 133. According to the panel, "the occurrence that allegedly aggravated plaintiff's condition was not an "accident' within the terms of Article 17 of the Warsaw Convention." *Id.* at 135.[9]

In two post-*Air France* cases involving allegations that the airline's failure to provide adequate medical care aggravated a passenger's heart attack, district courts have followed *Abramson* in finding no Article 17 "accident." *See Tandon v. United Air Lines*, 926 F.Supp. 366 (S.D.N.Y.1996); *Fischer v. Northwest Airlines, Inc.*, 623 F.Supp. 1064 (D.C.Ill.1985). *See also Walker v. Eastern Air Lines, Inc.*, 775 F.Supp. 111 (S.D.N.Y.1991) (parties agreed there was no Warsaw Convention "accident" where plaintiff alleged

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[9] *See also Adamsons v. American Airlines, Inc.*, 105 Misc. 2d 787, 433 N.Y.S. 2d 366 (N.Y. Sup. Ct. 1980), *aff'd*, 87 A.D.2d 785, 449 N.Y.S. 2d 487 (N.Y. App. Div. 1982) (not addressing the Warsaw Convention argument), *rev'd*, 58 N.Y.2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21 (1982) (not addressing the Warsaw Convention argument), *cert. denied*, 463 U.S. 1209, 103 S. Ct. 3540, 77 L.Ed. 2d 1390 (1983). In *Adamsons*, the airline refused to allow a sick patient to board a plane returning to the United States; allegedly, the delay in returning home resulted in plaintiff's paralysis. Plaintiff sued the airline for negligence, and the airline argued that the case was within the exclusive purview of the Warsaw Convention. The court rejected this argument, in part on the grounds that there was no "accident" within the terms of the Convention. 433 N.Y.S. 2d at 369. To the same effect, see *Northern Trust Co. v. American Airlines, Inc.*, 142 Ill. App. 3d 21, 96 Ill. Dec. 371, 491 N.E. 2d 417 (1985).

that inadequate care aggravated her husband's preexisting asthma condition and contributed to his death).

Initially, we note that we disagree with the plaintiffs' reading of the case law in their favor. We do not think the cases are accurately explained as focusing solely on the initial injury and—in essence—ignoring any subsequent events. *Abramson,* the leading case, is better explained as turning on a conclusion that the aggravation injury suffered by the plaintiff simply was not caused by "an unusual or unexpected event or happening external to the plaintiff." This conclusion is not unassailable: as we suggested above, it is at least arguable that where injury is caused by crew negligence, the injury arises from an "unexpected or unusual event or happening external to the plaintiff."

On the other hand, if we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson,* the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event"—instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same token, if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival,[10] then it seems clear that the aggravation injury

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[10] We identify this as the relevant event by asking what precise event or events allegedly caused the damage sustained by the plaintiff. In the instant case, it is clear that if the plaintiff suffered damage as a result of any external event, that event was the continuation of the flight and the resultant delay in hospitalization.

arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *See Warshaw v. Trans World Airlines, Inc.*, 442 F.Supp. 400, 412 (E.D.Pa.1977) ("[I]t is clear under Article 17 that if the hypothetical passenger's heart condition were to have been aggravated by the acceleration required on take-off, or by the deceleration which occurs when landing, such an occurrence would not be an injury as the result of an "accident'....").

We acknowledge that this is a close question, and we have done our best to do justice to the arguments on either side of the issue. However, ultimately we are convinced that the proper approach is indeed to look at a purely factual description of the events that allegedly caused the aggravation injury suffered by the plaintiff. Such an approach is in accord with the plain meaning of the phrase "event or happening" as used in the *Air France* Court's definition of "accident" and with the manner in which the Court described the decisions of the lower courts. In particular, we note that in summarizing the *Abramson* decision in a parenthetical, the Court described the relevant event as "sitting in airline seat during normal flight" notwithstanding the fact that the plaintiff had attempted to make out the Warsaw Convention claim based on the airline's "acts or omissions"—i.e., its negligence. *Air France,* 470 U.S. at 405, 105 S.Ct. at 1345. Next, we find that lower courts determining whether an "accident" has occurred have typically looked to a purely factual description of the event.[11] Finally, we think that

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[11] *See, e.g., Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1481 (11th Cir.1989) ("The engine failure in question was an "accident' within the meaning of the Convention ...."), *rev'd on* other grounds, 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991); *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 (9th Cir.1993) ("The presence of water on the stairs qualifies as an "accident' because it was both "unexpected or

looking at the factual events, as opposed to an assertion of "crew negligence," is in accord with the design of the Warsaw Convention, which provides carriers a "due care" *defense.*[12] Having provided for a defense turning on the absence of negligence, we think it is unlikely that the drafters intended that the initial "accident" inquiry be resolved by reference to negligence. *Cf. Air France,* 470 U.S. at 407, 105 S.Ct. at 1346 ("The "accident' requirement of Article 17 is distinct from the defenses in Article 20(1), both because it is located in a separate article and because it involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the

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unusual' and "external to' [the plaintiff]."); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 33 (2d Cir.1975) ("It is undisputed, moreover, that a terrorist attack is considered an "accident' within the purview of these provisions."), *cert. denied,* 429 U.S. 890, 97 S.Ct. 246, 50 L.Ed.2d 172 (1976); *Chendrimada v. Air-India,* 802 F.Supp. 1089, 1093 (S.D.N.Y.1992) ("[I]t is the fact of being kept on board the plane without food, no matter what the reason, which is itself the "unexpected and unusual event' in the chain."); *Diaz Lugo v. American Airlines, Inc.,* 686 F.Supp. 373, 375 (D.P.R.1988) ("The coffee spill was an unusual or unexpected event external to [the plaintiff] and, thus, an Article 17 "accident.' "); *Oliver v. Scandinavian Airlines System,* 17 Avi. (CCH) 18,283, 18,284 (D.Md.1983) ("[T]he proper focus is on what happened to the passenger. Consequently, this court concludes that an accident occurred when the fellow passenger fell unexpectedly upon the plaintiff."). We note that *Seguritan,* the sole case squarely supporting the defendant's position, is *contra.*

[12] Under Article 20(1) of the Warsaw Convention, carriers may defend claims on the grounds that they took all necessary measures to avoid the passenger's injury or that it was impossible to take such measures. *Air France,* 470 U.S. at 406-07, 105 S.Ct. at 1346. We note that the Montreal Agreement requires carriers to waive this "due care" defense for international flights which originate, terminate, or have stopping points in the United States. *Id.* However, this waiver is immaterial to the argument we present above.

injury."). As we set out in the preceding paragraph, looking solely to a factual description of the aggravating event in this case—i.e., the continuation of the flight to its scheduled point of arrival—compels a conclusion that the aggravation injury was not caused by an "unusual or unexpected event or happening that is external to the plaintiff."

The Supreme Court's treatment of the Third Circuit's holding in *Abramson* provides further support for our ultimate conclusion that the instant case does not involve a Warsaw Convention "accident." Expounding upon the assertion that its interpretation of the Convention was consistent with the weight of precedent in foreign and American courts, 470 U.S. at 400, 105 S.Ct. at 1343, the Court in *Air France* first described foreign case law supporting the decision, then wrote:

> These observations are in accord with American decisions which, while interpreting the term "accident" broadly, *Maugnie v. Compagnie Nationale Air France,* 549 F.2d, at 1259, nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger. *See, e.g. Abramson v. Japan Airlines Co.,* 739 F.2d 130 (C.A.3 1984) (sitting in airline seat during normal flight which aggravated hernia not an "accident"), cert.denied, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835; *MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir.1971) (fainting while waiting in the terminal for one's baggage not shown to be caused by an "accident"); *Scherer v. Pan American World Airways, Inc.,* 54 A.D.2d 636, 387 N.Y.S.2d 580 (1976) (sitting in airline seat during normal flight which aggravated thrombophlebitis not an "accident").

Id. at 404-05, 105 S.Ct. at 1345. We do not see any

material factual distinctions between *Abramson* and the instant case. We find support for our decision in the Supreme Court's suggestion that *Abramson* is an example of a case where "routine travel procedures ... produce an injury due to the peculiar internal condition of a passenger" and the Court's holding that this latter category of cases does not fit within the definition of "accident" for purposes of the Warsaw Convention.

For the foregoing reasons, we conclude that the events that transpired on the flight do not constitute an "accident" within the meaning of the Warsaw Convention.

III. FINDINGS REGARDING KRYS'S SYMPTOMS

Lufthansa also argues that the court below erred in finding that the plaintiff displayed the symptoms of a heart attack (as described by the American Medical Association and by Lufthansa's Manual) within the first one and one-half to three hours of the flight. According to Lufthansa's Operating Procedures Manual, the symptoms of a heart attack are as follows: "The patient complains about feeling an ongoing pain and tightness in his chest, which may radiate into the neck area and the left arm. The patient shows a sudden paleness and is restless." The manual also provides the following "rough distinction" between angina and a heart attack: "After administering [nitroglycerin], pain from angina pectoris disappears after 2 to 3 minutes at the most. In a heart attack, pain usually persists." The symptoms described by the American Medical Association are "crushing pain in the center of the chest, pain in the chest, pain in the jaw, arms, tightness in the chest, bursting sensation in the

chest, dizziness, shortness of breath, sweating, and nausea."[13]

The federal rules provide that a district court's findings of fact in actions tried without a jury may not be reversed unless clearly erroneous. Fed.R.Civ.P. 52(a). A finding is clearly erroneous when the reviewing court, after assessing the evidence in its entirety, is left with a definite and firm conviction that a mistake has been committed. *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). As the Supreme Court has cautioned:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74, 105 S.Ct. at 1511. The Supreme Court has further emphasized that where a trial judge's finding is "based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.* at 575, 105 S.Ct. at 1512.

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[13] We take this list of symptoms from a question asked by plaintiffs' counsel that appears to catalog the AMA-indicated symptoms. We note that we do not find the parties in dispute as to what the basic symptoms of a heart attack are.

Keeping the Supreme Court's admonitions firmly in mind, we find no clear error in the magistrate judge's finding that Krys displayed the symptoms of a heart attack within the first three hours of the flight. Mr. Krys testified that he went to the lavatory "about an hour and a half" into the flight because his stomach was upset and he felt nauseous and that he returned to the lavatory thirty minutes later because he was feeling nauseous and dizzy. There, he began to feel a "crashing, excruciating pain in [his] chest."[14] Krys also testified that he noticed his clothes were wet from perspiration. Josie Curry, a fellow passenger sitting in the row with Mr. Krys, testified that she observed him making these two trips and noticed that he was perspiring. Jan Holloway, another passenger, testified that she noticed the plaintiff returning from the lavatory:

> The first thing I really noticed was just glancing up and seeing someone coming back from like the restroom area, the galley area, just looking like he was airsick, you know, just that flushed kind of white pasty look you-hope-you-never-get-it type.... [K]ind of washed out is what I really meant, just where you just are gray and you just don't feel good.

Holloway also noticed that Krys was perspiring.

After returning from the lavatory, Mr. Krys contacted the flight attendant, who made an announcement asking any doctors on board to identify themselves to the crew. Dr. Fischmann responded to the call. In the estimation of both

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[14] We focus our review only on the symptoms *displayed* by Krys; however, we provide information regarding Krys's description of his subjective experiences to put the other testimony into context.

Josie Curry and Jan Holloway, the flight attendant was contacted between an hour and an hour and a half into the flight; by Krys's calculation, this happened approximately two hours into the flight. Krys, Curry, and Fischmann all testified that Krys told the doctor at this time that he was suffering chest pains. Krys's testimony reflects that he told Dr. Fischmann that he had pain in his chest radiating into his arms, pain in his jaw, difficulty breathing, dizziness, nausea, and sweating. Josie Curry described the plaintiff's state this way:

> He appeared to have difficulty breathing. He started to get pale. He appeared to be very uncomfortable, you know, with the movement within his seat. Made me notice that he was very uncomfortable. It was like this man is miserable.

Jan Holloway echoed this description: "The man just was, I don't want to say in agony, but he was uncomfortable, couldn't sit still, couldn't stand, couldn't—just whatever position he tried to get into to get comfortable, it didn't last long."

In treating Krys, Dr. Fischmann administered two separate doses of nitroglycerin.[15] Curry testified that after the nitroglycerin was administered, "it didn't appear [Krys] was getting better...." Even after the second administration of nitroglycerin, according to Josie Curry, "He seemed miserable. He was pale-colored.... He looked ... about the same as he did before...." In Dr. Fischmann's assessment,

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[15] Although Krys was also given oxygen, we focus on the effect of the nitroglycerin because, according to the Lufthansa Manual (discussed *supra*), angina pains typically dissipate upon the administration of nitroglycerin, while symptoms of a heart attack persist.

there was "no big difference" in Krys following the administration of the nitroglycerin. As for the relevant time frame, Josie Curry estimated that the second dose of nitroglycerin was administered three hours into the flight. Jan Holloway similarly estimated that the events involving the summoning of the doctor, the administration of oxygen, and the dispensing of the nitroglycerin all occurred "between like an hour and a half ... to two and a half, three hours [after leaving Miami]."

We are aware that there is contradictory evidence in the record. The purser on board the airplane, Jurgen Freund, estimated that the crew was not contacted until at least two and a half hours into the flight. Freund also claimed that at the time he first saw the patient, he did not see any of the following symptoms: sudden paleness, pain in the upper thorax radiating to the shoulder, and sudden perspiring.[16] Dr. Fischmann testified that Krys had chest pains, "but they weren't severe." According to the doctor, Krys was "complaining a little bit but not as a typical heart attack." Fischmann further testified that he did not observe a changed complexion or "cold sweating" in the patient until the flight was over Amsterdam and that he never observed the passenger having difficulty breathing to the point that he couldn't speak very well. The captain on board, Hans Schnabl, testified that he saw the patient while he was being attended by Dr. Fischmann and did not observe that Krys was suffering severe chest pains or that he was sweating profusely.

The magistrate judge could have credited either the testimony of Purser Freund, Dr. Fischmann, and Captain

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[16] At another point of his deposition, however, Freund stated that Krys "looked to me little bit pale."

Schnabl or the testimony of Leonard Krys, Josie Curry, and Jan Holloway. The choice made between these two permissible alternatives is, almost by definition, not clear error. *See Anderson,* 470 U.S. at 575, 105 S.Ct. at 1512. The challenged findings of the court below are not clearly erroneous.

IV. FINDINGS REGARDING LUFTHANSA'S NEGLIGENCE

Next, Lufthansa challenges the magistrate judge's finding that Lufthansa acted negligently in its response to the symptoms displayed by Krys.[17] In particular, Lufthansa

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[17] The magistrate judge made the following findings with regard to Lufthansa's negligence:

2. LUFTHANSA failed to take adequate measures to determine the life-threatening medical condition of LEONARD KRYS and failed to render, provide and/or secure necessary medical care.

3. LUFTHANSA failed to comply with its own policies and procedures to the detriment of LEONARD KRYS and failed to divert said aircraft and land at the nearest available airport.

4. LUFTHANSA through its employees, servants and/or agents, failed to observe and apply its own first aid instructions regarding cardiac infarctions to the detriment of its passengers, LEONARD KRYS.

5. LUFTHANSA failed to contact its ground personnel in order to obtain medical assistance.

6. LUFTHANSA departed from accepted airline industry practices in failing to take adequate measures to protect the health of its ticketed passenger, LEONARD KRYS.

Rather than reviewing each of these findings for error, we answer only Lufthansa's particular contentions as set out above.

argues that its reliance on Dr. Fischmann's analysis and advice fulfilled its duty to Mr. Krys.[18] We review the magistrate judge's application of the standard of care to the facts of the case—i.e., the determination on the ultimate question of negligence—for clear error. *Daley v. United States,* 792 F.2d 1081, 1086 (11th Cir.1986).

Lufthansa relies primarily on two lines of cases in support of its argument that its deference to Dr. Fischmann's opinion was not a breach of the duty a carrier owes to its passengers. One line of cases is easily disposed of. Lufthansa cites numerous cases establishing that under maritime law, a shipowner will not be held liable through *respondeat superior* for the negligence of the ship doctor. These cases are inapposite for two reasons. First, these cases establish a general rule of maritime law, and maritime law does not govern the disposition of the instant case.[19]

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[18] Lufthansa also argues that the question of the crew's negligence must not be determined "according to 20/20 hindsight" - i.e. according to the after-acquired knoiwledge that Mr. Krys indeed suffered a heart attack during the flight. Taken as a general admonition, we agree with this proposition. However, we find no support in the record for the implied assertion that the magistrate judge viewed the crew's actions through hindsight.

[19] The appellant argued both in its reply brief and at oral argument that maritime law should govern this case even if the Warsaw Convention does not apply. However, the appellant failed to argue this point as clearly as it should have in its initial brief on appeal. Rather, Lufthansa urged the application of maritime law in a somewhat different context, i.e., where the Convention applies but provides no rule of law on a particular issue. In other words, Lufthansa argued that maritime law should fill the interstices not covered by the Convention. Despite Lufthansa's lack of clarity, we may well have entertained the argument anyway had Lufthansa squarely and timely presented it to the district court. However, the record is clear that Lufthansa did not fairly raise the argument in a timely fashion in the district court, and therefore we

Second, the plaintiffs do not allege that Lufthansa is vicariously liable for the negligence of Dr. Fischmann; instead, they argue that the airline is liable for negligently deferring to Dr. Fischmann's assessment of the situation.

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decline to entertain the argument on appeal. Lufthansa has not brought to our attention any pretrial suggestion that maritime law should govern, and our own careful review of the record confirms that no such suggestion was made before trial. Quite the contrary, all the pretrial documents (e.g., the joint pretrial stipulation, Lufthansa's own mediation statement, the briefs on summary judgment, Lufthansa's own subsequent status report, and the order denying summary judgment) clearly contemplate that, absent preemption by the Warsaw Convention or the Federal Aviation Act, state law would apply. We think the record is clear that once the district court rejected appellant's preemption arguments, all parties and the court understood that the case would be tried under state law negligence principles.Two months *after* the trial, in its proposed findings of fact and conclusions of law, Lufthansa cited both Florida cases and maritime cases in support of its argument that Lufthansa did not breach its duty of carte. After plaintiffs distinguished the maritime cases in part by pointing out that they arose in admiralty, Lufthansa filed a supplemental memorandum ostensibly regarding "a recent decision on point." In that memorandum, Lufthansa explicitly asserted for the first time that "maritime law applied to Mr. Krys' case." Even then, the assertion was made in a short paragraph consisting only of a conclusory assertion and a citation to two cases. In response, plaintiffs argued, *inter alia*, that the point was waived. The court's order expressly applies Florida law and contains no discussion of the applicability of maritime law. We construe this as a rejection on the basis of untimeliness, which is amply warranted. Only after the court's order issued did Lufthansa finally present a fully developed argument that maritime law should apply. A party who has marshalled and presented its evidence upon the understanding that one body of law governs may be prejudiced by the belated application of a different body of law. For the foregoing reasons, we decline to address the question of whether maritime law should have been applied. *See Resolution Trust Corp. v Dunmar Corp.*,43 F.3d 587, 598-99 (11th Cir.) (declining to resolve issues not fairly raised in the district court) (en banc), *cert. denied*, — U.S. ----, 116 S.Ct. 74, 133 L.Ed.2d 33 (1995).

Next, Lufthansa cites two cases for the proposition that deference to the advice of a competent physician satisfies a carrier's duty of due care. In *Gamble v. The New Bedford,* 111 F.Supp. 8 (D.R.I.1953), a passenger on an excursion from Providence, Rhode Island, to Block Island, Rhode Island, fell down a ship staircase and was knocked unconscious. The crew placed the passenger in a canvas chair in a semi-reclining position. When he regained consciousness, the passenger complained of a pain in his hip. A doctor in Block Island directed that the passenger be kept in the position in which he had been placed until he could be hospitalized; the passenger then returned to Providence. The plaintiff complained that the care and treatment he received—namely, having been put in a chair rather than a bed—constituted negligence. The court stated the relevant standard of care as follows: "The duty of a ship owner to a passenger who is injured during the voyage is to see that his injuries receive such care and treatment as is reasonably practicable in view of the facilities available." *Id.* at 12.[20] Applying this standard to the facts, the court found no negligence:

> [T]he master was not a physician. The Court cannot say that the master, not knowing the full extent of libelant's injury, acted unreasonably in allowing libelant to remain in the adjustable chair. Furthermore, after Dr. Orlando's examination of the libelant, the master was acting under the doctor's direction in allowing libelant to remain in the position in which he had been placed. The Court is satisfied that at all times after the accident

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[20] Although *The New Bedford* is a suit in admiralty, we find its analysis relevant to our decision because the standard of care applied in *The New Bedford* is similar to the standard governing the instant case.

> the libelant was maintained in a position which the master reasonably believed was proper under the circumstances.... *The care and treatment which the master adopted on his own initiative prior to the time of Dr. Orlando's examination, and at the doctor's direction after said examination, appears to have been reasonable under the circumstances.*

Id. at 12 (emphasis added). Although Lufthansa attaches much significance to the court's subsequent statement that "the [c]ourts have generally held that a master fulfills his duty to exercise due care if he follows the advice of a competent physician," *id.*, we do not think *The New Bedford* stands for the proposition that deference to a competent doctor fulfills the standard of care in all conceivable situations. As we read the decision, particularly the language emphasized in the quotation above, the court reviewed the reasonableness of the treatment afforded the plaintiff, giving weight to the fact that a doctor had recommended that treatment. We think this is substantially different from holding that because the crew did what the doctor recommended, it was *ipso facto* not negligent.

In *The Van der Duyn,* 261 F. 887 (2d Cir.1919), cited both by appellant and by the *New Bedford* court, a coal passer injured his arm while at sea. The officers on board treated the cut and bruise and prevented any infection. When the ship docked in Cuba, a doctor examined the injury and reported that no other treatment was necessary. Upon the ship's return to New York, however, it was discovered that the plaintiff had a fractured ulna and required surgery. In answer to the plaintiff's complaint that he was not given "considerate treatment" on board the ship, the court wrote:

> The officers of the ship owed to respondent the exercise of reasonable care to furnish such aid as

> ordinarily prudent persons would under similar circumstances.... [The doctor] did not report a fracture, or any unusual or serious condition of the arm, and therefore it cannot be said that in the exercise of reasonable care it was incumbent upon the officers of the vessel to take the patient to a hospital in Cuba. On the return voyage to New York, the chief officer continued the treatment as directed by the doctor.
>
> ... We see nothing in the conduct of the officers of the ship which warrants condemnation, or upon which there may be fixed a liability for the shipowner. The requirement of a ship is to give reasonable medical treatment under all circumstances. There must be reasonable ground to believe that consequences more serious than the swelling, pain, and suffering which ordinarily attend a fracture or a severe laceration resulted, before liability be imposed. Medical advice received and followed, as was done by the officers of the ship, is all that could reasonably be expected from the officers here under the circumstances disclosed by this record.
>
> The ship will not be held responsible for an error of judgment on the part of the officers, if their judgment is conscientiously exercised with reference to conditions existing at the time.

Id. at 889-90. We think that *The Van der Duyn,* like *The New Bedford,* falls short of saying that reliance on a doctor fulfills the carrier's duty in all circumstances.

The parties do not cite, and our own research has not disclosed, more recent analogous cases. We therefore

proceed to determine whether the magistrate judge's finding of negligence was clearly erroneous. Under Florida law,[21] a common carrier must "exercise the highest degree of care, foresight, prudence and diligence reasonably demanded at any given time by the conditions and circumstances then affecting the passenger and the carrier during the contract of carriage." *Swilley v. Economy Cab Co. of Jacksonville,* 46 So.2d 173, 177 (Fl.1950).

We agree that whether Lufthansa breached this duty is a close question. We are not unsympathetic to the defendant's argument that the crew's deference to Dr. Fischmann's analysis was reasonable under the circumstances—especially in light of the recognized difficulty of distinguishing a heart attack from other conditions that cause similar symptoms. Were we deciding the question of negligence *de novo,* perhaps we would resolve the issue differently. However, we do not sit in the place of the factfinder; we are only to ask whether the finding is clearly erroneous in view of the entire record. That much, we cannot say.

Plaintiff adduced expert testimony to the effect that the Lufthansa crew deviated from the airline industry standards which prevailed at the time of the incident.[22] Captain Paul Roitsch, an expert in aviation standards, testified:

> It's my opinion ... that the mere fact that a person appears and announces that he's a doctor does not

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[21] We note that Lufthansa has not challenged the applicability of *Florida* law given the assumption that state law is to be applied.

[22] Under Florida law, industry-wide standards are admissible as relevant, although not conclusive, evidence of the standard of care. *Brown v. Sims,* 538 So.2d 901, 905 (Fla.Dist.Ct.App.1989), *quashed in part on other grounds,* 574 So.2d 131 (Fla.1991).

> relieve the crew of their responsibilities whatever. They must still continue to monitor and see what's happening and make sure that it's correct, which was not done in this case, and I think the results show what happens when the crew decides to walk away from a situation because there's a doctor on the scene.
>
> It's my feeling that Purser Freund should have immediately gone into his books and said to himself, I'm going to read and see what Lufthansa tells us to do about a heart attack, about a person with these symptoms, so that he could monitor what was happening.

Captain Roitsch summarized the failings of the crew as follows:

> [B]asically I see this as a failure to communicate. The airline established procedures for handling situations like this.[23] The captain must bear the ultimate responsibility as the person in charge ... who abrogated his responsibility and handed it over

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[23] The Lufthansa Operating Procedures Manual describes the following "therapy" for a passenger displaying symptoms of a heart attack:

> Have the patient relax in supine position with slightly elevated upper body. Talk to the patient in a calming manner. Give fresh air and, if possible, supply with oxygen. Give 1 to 2 Nitrolingual [a brand name of nitroglycerin] capsules to chew in intervals (every hour). Check pulse in short intervals (every 15 minutes). After landing, have the patient immediately admitted to a hospital.

The Lufthansa Flight Operations Manual provides that a flight "may divert enroute" if a "passenger on board of flight requir[es] immediate medical assistance."

to another individual.

[T]he captain should have made absolutely sure that he was getting good information at every point in the affair with Mr. Krys.

This did not happen for some reason.... [I]f [the captain] had information that Mr. Krys was suffering the way he was suffering and has been described as suffering, that captain would have turned immediately and landed....

I guess what I'm trying to say is that the defense has said that if the doctor hadn't been there, Captain Schnabl would have landed, which tells us basically it's too bad the doctor was there, because his presence affected this event adversely in several ways, the most important one of which was it diverted apparently every person in that crew from pursuing his or her responsibilities, and I take that down to the last person in the cabin.

Roitsch further testified:

I am impressed by the fact that two lay witnesses were able to describe Mr. Krys's symptoms in a manner that absolutely fulfills the description of a heart attack by the AMA, by Lufthansa German Airlines, and by Dr. Fischmann himself.

I cannot believe, it's so difficult to believe that these were not evident also to that cabin crew, and being evident to the cabin crew, they should have passed on to the captain and to the doctor and the question asked should we not rethink our decision to land and land immediately.

> There was one other thing that I wanted to say in here, and I think this is very crucial: That airplane was a full airplane. Everybody was very, very busy.... I think the volunteering of this doctor provided a means by which all of these crew members could say, fine, everything is wonderful, we can proceed as we normally would, and that to me is an abrogation of the responsibility that's placed in their hands.

Asked whether, based on industry standards, he believed the flight should have landed, the witness testified: "Yes, I believe they should have landed on the East Coast of the United States, or even farther up into Nova Scotia or Newfoundland would have been acceptable."[24]

We have upheld the magistrate judge's finding that Krys displayed all of the symptoms of a heart attack as outlined by the AMA and by Lufthansa's operating manual. *See* section III above. In light of that fact and the entirety of the evidence, we think the magistrate judge could conclude that notwithstanding Dr. Fischmann's impressions, Lufthansa's employees knew or should have known that Mr. Krys was suffering a heart attack, and thus that an unscheduled landing was necessary. Therefore, we cannot say that the magistrate

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[24] In addition to Captain Roitsch's testimony, we note that Captain Schnabl himself testified:

> If [Krys displayed all the symptoms alleged by the plaintiff], I would talk to the doctor much longer than I did and really ask him what's happening here. For heaven's sake, how are we going to continue? I would have to take care of it, and I would not have believed the situation was under control.... But if I get the word of a doctor that the situation is under control, there is no reason to divert and land....

judge's finding of negligence was clearly erroneous.

V. FINDINGS REGARDING DAMAGE TO KRYS'S HEART

Lufthansa argues that "even if an emergency landing had been made along the North American coast Krys would still have sustained damage to his heart wall." Taking this point of error as a challenge to the fact finding that Mr. Krys sustained significant permanent injury to his heart as a direct result of the failure to land the aircraft at an available airport,[25] we review for clear error.

We take Lufthansa's argument to be that enough time would have elapsed during the execution of an unscheduled landing and transportation to a nearby hospital that whatever treatment Krys could have received could not have mitigated the damage done to his heart. We note that there was conflicting evidence in the record as to how much time would have been required to land the plane and get Krys to a hospital; similarly, precisely when the heart attack occurred was a matter of some debate. However, even assuming *arguendo* that appellant is correct in asserting that

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[25] Given the questions asked by defense counsel of the witnesses and the precise phrasing of their point of error, we suspect that Lufthansa's argument is actually that Krys would have suffered *some* heart damage regardless of whether the plane made an unscheduled landing. We need not dwell on the factual accuracy of this point, for it is legally insignificant insofar as the question is whether Lufthansa is liable for negligence. Lufthansa may be liable for negligence so long as the delay *aggravated* the damage to the heart. Out of an abundance of caution, we take the appellant to have raised the relevant question and address it above. To the extent that Lufthansa's argument about the inevitability of some damage to the heart relates to the amount of damages awarded to the plaintiff, we factor this argument into our resolution of the appellant's excessive damages argument. *See* section VI *infra*.

treatment could not have been administered for three hours after the heart attack,[26] we find no clear error.

Dr. Peter Segall, a Miami cardiologist and one of Leonard Krys's treating physicians, testified that "if you are able to give thrombolytic therapy [27] within the first six hours after a myocardial infarction, you limit significantly the size of the amount of damage done, and the longer you wait, the less chance you have of helping." Dr. Segall testified more specifically that "had [Krys] received thrombolytic therapy two to four hours after the onset of symptoms, he would have experienced significantly less damage than he did suffer."[28] Dr. Leonard Zwerling, also a Miami cardiologist and treating physician to Mr. Krys, testified, "If he had been given thrombolytic therapy within the first few hours of his heart attack—the earlier the better, by the way—the chances are he would have a diminution, or lessened the size of the heart muscle damage." Responding to defense counsel's suggestion that the damage Mr. Krys's heart sustained was a result of the heart attack rather than the delay in treatment, Dr. Zwerling stated, "It is a result potentially, [of] every delay, because the size of the damage might have been lessened if he received thrombolytic therapy

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[26] While we assume this time frame to be correct for the sake of argument, we note that we are inclined to think the appropriate time frame is actually less than three hours.

[27] According to Dr. Segall, thrombolytic therapy involves the administration of streptokinase. Thrombolytic therapy is "designed to break down the blood clot, which is the ultimate insult, ultimate occlusion which causes the heart damage."

[28] According to Dr. Segall, "longevity after a myocardial infarction is best related to the amount of damage that was caused by the heart attack."

earlier." Dr. Leonard Sommer, a Miami cardiologist who examined Mr. Krys, testified that "within four to six hours after the onset of an infarction thrombolysis can diminish but probably not reverse completely a heart attack."

The magistrate judge's fact finding was supported by ample evidence.

VI. EXCESSIVENESS OF DAMAGES

Finally, Lufthansa argues that the damages should be set aside as excessive.[29] The magistrate judge awarded compensatory damages in the amount of $1.8 million to Leonard Krys and $600,000 to Rebeca Krys. Because state law provides the rule of decision in this case—at least as it has been litigated,[30] our determination of whether this award was excessive is governed by state law. *Finch v. City of Vernon,* 877 F.2d 1497, 1506 (11th Cir.1989). In *Lassitter v. International Union of Operating Engineers,* 349

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[29] We note that the magistrate judge denied Lufthansa's post-trial motion for remittitur under Fed.R.Civ.P. 59. The judge wrote:

> Lufthansa's Motion for Remittur fails to comply with Local Rule 7.1A by not including therein a memorandum of law in support. Furthermore, remittur is not proper in cases involving bench trials.

Lufthansa has not argued that the magistrate judge erred in denying the motion for remittitur; it has only urged us to set aside the verdict.

[30] We qualify our statement regarding the applicability of state law in light of our decision not to address the preemptive scope of the Warsaw Convention in the absence of an "accident" or the applicability of maritime law.

So.2d 622, 626-27 (Fla.1976), the Florida Supreme Court examined "certain well-established rules which control a review of the question of excessiveness of a jury's verdict":

In *Seaboard Coast Line Railroad Company v. McKelvey*, 270 So.2d 705, 706 (Fla.1973), we said:

> "Consistently, our Courts have vested juries with the sound discretion to render verdicts in personal injury cases, upon the equally consistent admonition that there is ample evidence to support such verdicts and that the verdicts are not clearly arbitrary or so excessive as to indicate passion, prejudice, corruption, improper motive or to shock the judicial conscience."

Also in *Odoms v. Travelers Insurance Company*, 339 So.2d 196 (Fla.1976), we said:

> "Under the general rule a verdict should not be disturbed on the ground of excessiveness unless it is manifestly so excessive as to shock the judicial conscience, or unless it is so excessive as to be indicative of prejudice, passion or corruption on the part of the jury, or unless it clearly appears that the jury ignored the evidence or misconceived the merits of the case relating to the amount of damages recoverable as, for example, by taking into consideration improper elements of damages." At p. 198.

Although the verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion,

prejudice, or gross mistake. In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like. See *Damage Verdicts* by Parmele, Vol. 1, § 1 (1972).

We agree with Lufthansa that the verdict seems large. However, Florida law sets a high standard for setting verdicts aside as excessive, and in light of this standard, we cannot conclude that the verdict was excessive.

VII. CONCLUSION

Having rejected each of the appellant's points of error,[31] we affirm the judgment. AFFIRMED.[32]

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[31] Appellant raises as a separate point of error that the magistrate judge's award of attorney's fees under Florida law was preempted either by the Warsaw Convention or by general maritime law. This argument is foreclosed by our resolution of Lufthansa's primary arguments regarding the applicability of the Warsaw Convention and maritime law.

[32] The appellees' motion for appellate attorney's fees is granted. *See* Fl. Stat. §§ 768.79 and 59.46. We remand this case for a determination of the appropriate sum.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEONARD KRYS and
REBECA KRYS CASE NO. 92-2488- C I V - HURLEY

Plaintiffs,

vs
LUFTHANSA GERMAN
AIRLINES

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court upon the Amended Complaint for Money Damages of LEONARD KRYS and REBECA KRYS, his wife, as Plaintiffs. Plaintiffs seek the entry of a final judgment against Defendant, LUFTHANSA GERMAN AIRLINES, for compensatory and punitive damages as a result of LUFTHANSA's failures in connection with LEONARD KRYS' serious in-flight illness on November 30, 1991 during LUFTHANSA's flight 463 from Miami to Frankfurt.

FINDINGS OF FACT

1. LUFTHANSA breached its common law duty owed to LEONARD KRYS on November 30, 1991 while a ticketed passenger an board flight number 463.

Evidenced in the record by the testimony of the following; **Jurgen Freund**, p. 271, in. 4-6; p. 272, in. 5-25; p. 273, in. 1. **Captain Paul Roitsch,** p. 300, ln. 5-24; p. 341, in. 22-25; p 342, ln. i-S, in. 19-25; p. 343, in. 1-18; p. 34S, ln. 3-22. **Samuel Fischmann, M.D.,** p. 419, in. 1-9; p. 424, in. 1-9; p. 431, ln. 16-21. **Captain Hans Schnabl,** p. 78, in. 2-4; p. 83, ln. 1221; p. 84, in. 1-14; p. 94, 1-n. 6-11; p. SS6, in. 7-12; p. 561, ln. 2S; p. 562, in. 1-5. **Leonard Krys,** p. 104, ln. 18-19; p125, in. 4-7.

2. LUFTHANSA failed to take adequate measures to determine the life-threatening medical condition of LEONARD KRYS and failed to render, provide and/or secure necessary medical care.

Evidenced in the record by the testimony of the following: **Jurgen Freund,** p. 190, in. 16-22; p. 191, in. 9-11, in. 20-21; p. 194, in. 22-25; p. 195, in. 1-6, 1-ii. 12-18; p. 197, in. 1-3, in. 7-25; p. 233, in. 8-14; p. 242, in. 4-7; p. 248, 1n. 23-25; 1n. 249, in. 1-2; p. 252, 10-13; p. 262, in. 2-9; p. 267, in 12-17; p. 268, in. 22-25; p. 2610, ln. 1; p. 272, in. 5-25; p. 273, ln.1; p. 274, in. 7-15, in. 23-25; p. 275, in. 1-3. **Captain Paul Roitsch,** p. 302, in. 1-14; p. 304, in. 16-25; p. 305, in. 16; p. 313, in. 13-17; p. 3.15, in. 12-2l; p. 316f ln. 6-11; p. 327, in. 16-25; p. 330, in. 19-2S; p. 337, in. 15-18; p. 345, in. 3-22. **Plaintiffs, Exhibit 3,** record p. 390, in. 22-25; 391, in. 1-9. **Captain Hans Schnabl,** p. 86, in. 13-20; p. 87, in. 4-16, in. 23-21; p. 88, in. 1-2, in. 19-25; p. 89, in. 1-2; p. 92, in. 1-25; p. 93, in. 17-21; p. 94, ln. 6-11, in. 20-24; p. 96, ln. 21-25; p. 97, 1-7a. 1-25; p. 98, in. 4-6; p. S54, in. 1-10p. 555, in. 1-5; p. 556, in. 2-12; p. 557, in. 3-12; p. 560, in. 2-5, in. 18-19; p. 561, in. 1-5, ln. 17-19, in. 25; p. 562, in. 1-5, in. 18-25; p. 563, in. 1, in. 3-18. **Samuel Fischmann, M.D.,** p. 202, in. 12-17; p. 203, in. 1-21; p. 417, in. 8-11; p. 42S, in. 6-12; p. 429, in. 1-6; p. 430, in. 22-24. **Jan Holloway,** p. 169,

in. 10-12, p. 170, in. 12-23, in. 25; p. 171, in. 1-2, In. 18-21; p. 172, in. 5, in. 8-13, in. 17-22; p. 173, in. 4-5; p. 174, in. 7-12, p. 175, in. 6-12; p. 176, ln. 7-24; p. 177, in. 10-19; p. 473, In. 14-17, In. 20-22; p. 477, In. 3-9, In. 19-25; p. 478, In. 1-3, In. 11-15; p. 479, ln. 1-12, In. 15-25; p. 480, In. 1-2, ln. 10-25; p. 481, In. 1-5; p. 482, In. 3-9. **Tanya Banghard**, p. 492, In. 14-15, In. 19-25; p. 493, In. 1-4, In. 18. 20; p. 494, In. S-10; p. 497, In. 16-20. **Laurent Wintringer**, p. 505, ln. 7-12; p. 506, In. 22-25; p. 507, In. 18-21; p. 509, In. 7-16. **Josie Curry**, p. 47, In. 15-25; p. 48, In. 1-18; p. 5O, In. 4-15; p. 5l, In. 2-15; p.. 52, In. 14-16; p. 53, In. 12-14, In. 19-22; p. 54, In. 4-12, In. 18-25; p. 55, In. 1-2, In. 9-23; p. 56, In. 5-16; p. 57, In. 17-25; p. 58, In. 17-25; p. 59, In. 1-4; p. 60, In. 8-16, In. 24-25; p. 61, In. 1, In. 5-7; p. 63, In. 15-18; p. 64, In. 2-6, In. 12-15; p. 65, In. 24-25. **Leonard Krys**, p. 107, In. 7-25; p. 108, In- 1-23; p. 110, In. 6-20; p. 111, In. 8-12, In. 20.-25; p. 112, In. 3-24; p. 113, In. 1-9, In. 11-24; p. 115, In. 2-7; p. 116, In. 6-22; p. 132, In. 3-10-; p. 137, ln. 11-25; p. 138, In. 1-17; p. 139, In. 19-25; p. 140, In. 1-14, In. 24-25; p. 141, In. 1-2; p. 142, In. 21-25; p. 143, In. 1-25; p. 144, In. 6-12, In. 146, In. 20-25; p. 147, In. 1-17; p. l62, In. 22-25; p. 163, In. 1-2, In- 8-11; p. 164, In. 3-4; p. In. 24-25;. p. 166, In. 1-4. **Christian Maikowski, M.D.**, p. 214, In. 14-21; p. 115, In. 6-8.

3. LUFTHANSA failed to comply with its own policies and procedures to the detriment of LEONARD KRYS and failed to divert said aircraft and land at the nearest available airport.

Evidenced in the record by the testimony of the following: **Jurgen Freund**, p. 190, In. 16-22; p. 191, In. 9-11, In. 20-21; p. 194, In. 22-25; p. 195, In. 1-6, In. 12-18; p. 197, In. 1-3, In. 7-25; p. 274, In. 12,-15. **Captain Paul Roitsch**, p.

300, In. 5-24; p. 302, In. 1-14; p. 306, In. 25; p. 307, In. 1-20; p. 308, In. 23-25; p. 309, In. 1-4, In. 16-24; p. 310, In. 8-13, In. 17-24; p. 311, In. 9-16, In. 20-28; p. 312, In. 1-12; p. 318, In. 20-25; p. 319, In. 1-3; p. 325, In. 18-25, p. 326, In. 11-25; P. 327, In. 1-8, in. 16-25; p. 340, In. 19-24, p. 342, In. 19-25; 343, In. 1-18; p. 345, In. 3-22. **Plaintiffs' Exhibit 2**, record p. 389, In. 12-25; p. 390, In. 1-5. **Samuel Fischmann, M.D.**, p. 202, In. 12-17; p. 203, In. 1-21; p. 414, In. 10-15; p. 416, In. 17-20; p. 417, In. 8-11; p. 419, In. 3-9; p. 420, In. 22-23; p. 423, In. 24-25; p. 424, In. 1-9, In. 20-21; , p. 425, In. 6-12; p. 429, In. 1-6; p. 431, In. 16-21. **Jan Holloway**, p. 170, In. 12-23, In. 25; p. 171, lri. 1-2, In. 18-21; p. 175, ln. 6-12; p. 176, In. 14-24; p. 477, ln. 3-9, In. 19-2S; p. 478, ln. 1-3, ln. 1115; p. 479, In. 1-12, In. 15-25; p. 480, In. 1-2, In. 10-25; p. 481, In. 1-5; p. 482, In. 3-9. **Tanya Banghard**, p. 492, In. 14-15, In. 19-25; p. 493, In. 1-4, In. 18-20; -p. 494, ln. 5-10; p. 497, In. 16-20; p. 500, In. 13-17, p. 501, ln. 2-23. **Laurent Wintringer**, p. 505, ln. 7-12; p. 506, ln. 22-25; p. 507, ln. 1821; p. 509, In. 7-16. **Captain Hans Schnabl**, p. 83, In. 12-21; p. 84, ln. 1-25; p. 85, In. 1-10; p. 86, ln. 13-25; p. 87, ln. 416, In. 23-25; p. 88, In. 1-2, In. 19-25; p. 89, ln. 1-2; p. 92, In. 1-25; p. 93, ln. 17-21; p. 94, In. 6-11, In. 20-24; p. 96, ln. 21-25; p. 97, In. 1-25; p. 98, ln. 4-6; p. 554, ln. 1-10; p. 555, In. 1-5; p. 556, In. 2-12; p. 557, In. 3-12; p. 559, ln. 5-13; p. 560, In. 2-5, In. 18-19; p. 561, In. 1-5, ln. 17-19, In. 25; p. 562, In. 1-5, In. 18-25; p. 563, ln. 1, In. 3-18. **Josie Curry**, p. 47, In. 15-25; p. 48, In. 1-18; p. 49, ln. 20-23; p. 51, ln. 2-15; p. 54, In. 4-12, ln. 18-25; p. 55, ln. 1-2, In. 9-23; p. 56, In. 5-16; p. 57, In. 17-25; p. 58, In. 17-25; p. 59, ln. 1-4; p. 60, ln. 8-16, In. 24-25; p. 61, ln. 1, In. 5-17; P. 63, ln. 15-18; p. 64, In. 2-6, In. 12-15; p. 65, ln. 24-25. **Leonard Krys**, p. 113, In. 11-24; p. 114, ln. 24-25; p. 115, ln. 1-7; p. 132, In. 3-10; p. 138, In. 10-12; p. 139, In. 19-23; p. 141, In. 24-25; p. 142, ln. 1-6; p. 146, in. 4-10, In. 20-25; p. 147, In. 1-17; p. 162,

ln. 22-25; p. 163, ln. 1-2; p. 164, In. 3-4.

4. LUFTHANSA, through its employees, servants and/or agents, failed to observe and apply its own first aid instructions regarding cardiac infarctions to the detriment of its passenger, LEONARD KRYS.

Evidenced in the record by the testimony of the following: **Captain Paul Roitsch**, p. 302, In. 1-14; p. 311, In. 9-16, In. 2025; p. 312, In. 1-12; p. 326, In. 11-25; p. 327, In. 1-8, In. 16-25; p. 330, ln. 19-25, p. 340, In. 2.9-24; p. 345, In. 3-22. **Plaintiffs' Exhibit 3**, record p. 390, In. 22-25; p. 391, In. 1-9, **Samuel Fischmann, M.D.**, p. 203, In. 1-21; p. 414, In. 10-I2; p. 416, In. 17-20; p. 419, In. 3-9; p. 420, In. 22-23; p. 423, In. 24-25; p. 424, In. 1-9, In. 20-21; p. 425, In. 6-12; p. 429, In. 1-6; p. 430, In. 22-24. **Leonard Sommer, M.D.**, p. 441, In. 12-14; p. 463, In. 12-20. **Jan Holloway**, p. 169, In. 10-12; p. 170, In. 12-23, In. 25; p. 171, In. 1-2, In. 18-21; p. 172, In. 5, In. 8-13, In. 17-22; p. 173, In. 4-5; p. 174, In. 7-12; p. 176, In. 7-24; p. 177, In. 10-19; p. 473, In. 14-17, In. 20-22; p. 476, In. 2-17; p. 477, In. 3-9, In. 19-25; p. 478, In. 1-3, In. 11-15; p. 479, In. 1-12, In. 15-25; p. 480, In. 1-2, In. 10-25; p. 481, In. 1-5; p. 482, In. 3-9. **Tanya Banghard**, p. 492, In. 14-15, In. 19-25; p. 493, In. 1-4, In. 18-20; p. 494, In. 5-10; P. 497, In. 16-20; p. 500, In. 13-17; p. 501, In. 2-23. **Laurent Wintringer**, p. 502, In. 25; p. 503, In. 2; p. 505, In. 712; p. 506, In. 22-25; p. 507, In. 18-21; p. 509, In. 7-16. **Captain Hans Schnabl**, p. 87, In. 4-16, In. 23-25; p. 88, In. 1-2, In. 9-14; p. 93, In. 17-21; p. 96, In. 21-25; p. 97, In. 1-25; p. 98, In. 4-6, In. 24-25; p. 99, In. 1-24; p. 555, In. 1-5; p. 557, In. 3-12. **Josie Curry**, p. 47, In. 15-25; p. 48, In. 1-18; p. 50, In. 4-15; p. 51, In. 2-15; p. 52, In. 14-16; p. 53, In. 12-22; p. 54, In. 4-12, In. 18-25; p. 55, In. 1-2, In. 9-23; p. 56, In. 5-16; p. 57, In. 17-25; p. 58, In. 17-25; p. 59, In. 14; p. 60, In. 8-10, In. 24-25; p.

61, In. 1, In. 5-17; p. 65, In. 24-25. **Leonard Krys**, p. 107, In. 7-25; p. 108, In. 1-23; p. 110, In. 6-20; p. 111, In. 8-12, In. 20-25; p. 112, In. 3-24; p. 113, In. 11-24; p. 114, In. 4-12; p. 116, In. 8-22, p. 132, In. 3-10; p. 137, In. 11-25; p. 138, In. 1-17; p. 139, In. 19-25; p. 140, In. 1-14, In. 24-25; p. 141, In. 1-2; p. 142, In. 21-25; p. 143, In. 1-24; p. 144, In. 6-12; p. 145, In. 2-6, In. 17-25; p. 146, In. 1, In. 4-10, In. 20-25; p. 147, In. 1-17; p. 162, In. 22-25; p. 163, In. 1-2, In. 8-11; p. 165, In. 24-25; p. 166, In. 1-4. **Jurgen Freund**, p. 190, In. 16-22; p. 191, In. 9-11; p. 194, In. 22-25; p. 195, In. 1-6, In. 12-18; p. 197, In. 1-3, In. 7-25; p.272, In. 11-25; p. 273, In. 1; p. 274, In. 3-15, In. 23-2; p. 275, In. 1-15. **Christian Maikowski, M.D.**, p. 214, In. 14-21; p. 215, In. 6-8.

5. LUFTHANSA failed to contact its ground personnel in order to obtain medical assistance.

Evidenced in the record by the testimony of the following: **Captain Hans Schnabl**, p. 94, In. 1-5; p. 100, In. 8-15; p. 556, In. 2-6; p. 562, In. 18-25; p. 5G3, In. 1.

6. LUFTHANSA departed from accepted airline industry practices in failing to take adequate measures to protect the health of its ticketed passenger, LEONARD KRYS.

Evidenced in the record by the testimony of the following: **Jurgen Freund**, p. 275, In. 8-15. **Captain Paul Roitsch**, p. 301, In. 5-12, In. 16-18; p. 302, In. 1-14, In. 19-24; p. 303, In. 10-11; p. 304, In. 16-25; p. 305, In. 1-6; p. 306, In. 25; p. 307, In. 1-20; p. 315, In. 12-21; p. 318, In. 20-25; p. 319, In. 1-3; p. 324, In. 22-25; p. 337, In. 15-18; p. 340, In. 19-24; p. 341, In.22-25; p. 342, In. 1-5, In. 19-25; p. 343, In. 1-18; p. 345, In. 3-22. Samuel Fischman, M.D., p. 417, In. 8-11; p. 419, In. 3-9; p. 431, In. 16-21. **Captain Hans Schnabl**, p. 83, In. 12-21; p. 84, In. 1-14; p.

87, In. 4-16, In. 23-25; p. 88, In. 1-2, In. 19-25; p. 89, In. 1-2; p. 92, In. 1-25; p. 93, In. 17-21; p. 94, In. 6-11, In. 20-24; p. 554, In. 1-10; p. 555, In. 1-5; p. S56, In. 2-12; p. 557, In. 3-12; p. 560, In. 2-5, In. 18-19; p. S61, In. 1-5, In. 17-19, In. 25; p. 562, In. 1-5, In. 18-25; p. 563, In. 1, In. 3-18. **Leonard Krys**, p. 107, In. 7-10; p. 112, In. 1424; p. 114, In. 24-25; p. 115, In. 1-7. **Jan Holloway**, P. 176, In. 14-24.

7. LEONARD KRYS was not comparatively negligent while a passenger on LUFTHANSA's flight 463, on November 30, 1991. While experiencing the symptoms of a heart attack throughout flight 463, LEONARD KRYS was not responsible to divert and land the aircraft but did seek the assistance of LUFTHANSA, through its employees, agents and/or servants, who failed to make an independent assessment and address their own company rules and regulations regarding the symptoms presented.

Evidenced in the record by the testimony of the following:

Captain Paul Roitsch, p. 302, In. 1-24; p. 303, In. 10-11; p. 304, In. 16-25; p. 305, In. 1-6; p. 310, In. 8-13, In. 17-24; p. 311, In. 9-16, In. 20-25; p. 312, In. 1-12; p. 313, In. 13-17; p. 315, In. 12-21; p. 316, In. 6-11; p. 325, In. 18-25; p. 326, In. 11-25; p. 327, In. 1-5, In. 16-25; p. 330, In. 19-25; p. 337, In. 15-18; p. 340, In. 19-24; p. 341, In. 22-25; p. 342, In. 1-5, In. 19-25; p. 343, In. 1-18; p. 245, In. 3-22.

Plaintiffs' Exhibit 3, record p. 390, In. 22-25; p. 391, In. 1-9. **Jurgen Freund,** p. 190, In. 16-22; p. 191, In. 9-11, In. 20-21; p. 194, In. 22-25; p. 195, In. 1-6, In. 12-18; p. 197, In. 1-3, In. 7-25; p. 233, In. 8-14; p. 242, In. 4-7; p. 248, In. 23-25; p. 249, In. 1-2; p. 252, In. 10-13; p. 262, In. 2-9; p. 267, In. 12-17; p. 268, In. 22-25; p. 269, In. 1; p.

272, In. 5-25; p. 273, ln. 1; p. 274, In. 7-15, In. 23-25; p. 275, In. 1-3. **Captain Hans Schnabl,** p. 86, In. 13-20; p. 87, In. 4-16, In. 23-25; p. 88, In. 1-2, In. 19-25; p. 89, In. 1-2; p. 92, In. 1-25; p. 93, In. 17-21; p. 94, In. 6-11; In. 20-24; p. 96, In. 21-25; p. 97, In. 1-25; p. 98, In. 4-6; p. 554, In. 1-10; p. 555, In. 1-5; p. 556, In. 2-12; p. 557, In. 3-12; p. 560, In. 2-5. In. 18-19; p. 561, In. I-5, In. 17-19, In. 25; p. 562, In. 1-5, ln. 18-25; p. 563, In. 1, In. 3-18. **Samuel Fischmann, M.D.,** p. 202, In. 12-17; p. 203, In. 1-21; p. 417, In. 8-11; p. 425, In. 6-12; p. 429, In. 1-6; p. 430, In. 22-24. **Jan Holloway,** p. 169, In. 10-12; p. 170, In. 12-23, In. 25; p. 171, In. 1-2. In. 18-21; p. 172, In. 5, In. 8-13, In. 17-22; p. 173, In. 4-5; p. 174, In. 7-12; p. 175, In. 6-12; p. 176, In. 7-24; p. 177, In. 10-19; p. 473, In. 14-17, In. 20-22; p. 477, In. 3-9, In. 19-25; p. 478, In. 1-3, In. 11-15; p. 479, In. 1-12, ln. 15-25; p. 480, In. 1-2. In. 1025; p. 481, In. 1-5; p. 482, In. 3-9. **Tanya Banghard**, p. 492, In. 14-I5, In. 19-25; p. 493, In. 1-4, In. 18-20; p. 494, In. 510; p. 497, In. 16-20. **Laurent Wintringer,** p. 505, In. 7-12; p. 506, In. 22-25; p. 507, In. 18-21; p. 509, In. 7-16. **Josie Curry,** p. 47, in. 15-25; p. 48, In. 1-18; p. 50, In- 4-15; P. 51, In. 2-15; p. 52, In. 14-16; p. 53, In. 12-14, In. 19-22; p. 54, In. 4-12, In. 18-25; p. 55, In. 1-2, In. 9-23; p. 56, In. 5-16; p. 57, In. 17-25; p. 58, In. 17-25; p. 59, In. 1-4; p. 60, In. 8-16, In. 24-25; p. 61, In. 1, In. 5-7; p. 63, In. 15-18; p. 64, In. 2-6, In. 12-15; p. 65, In. 24-25. **Leonard Krys**, p. 107, In. 7-25; p. 108, In. 1-23; p. 110, In. 6-20; p. 111, In. 8-12, In. 20-25; P. 112, In. 3-24; p. 113, In. 1-9, In. 11-24; p. 115, In. 2-7; p. 116, In- 6-22; p. 132, In. 3-10; p. 137, ln. 11-25; p, 138, In- 1-17; p. 139, In. 19-25; p. 140, In. 1-14, In. 24-25; p. 141, In. 1-2; p. 142, In. 21-25; p. 143, In. 1-25; p. 144, ln. 6-12; p. 146, In. 20-25; p. 147, In. 1-17; p. 162, In. 22-25; p. 163, In. 1-2, In. 8-11; p. 164, In. 3-4; p. 165, ln. 2425; p. 166,

in. 1-4. **Christian Maikowski, M.D.,** p. 214, In. 14-21; p.

215, In. 6-8.

8. LEONARD KRYS suffered the symptoms of a cardiac infarction, as described by the American Medical Association and LUFTHANSA's Manual, while a passenger on Lufthansa flight 463 from Miami, Florida to Frankfurt, Germany within the first one and one-half (I 1/2) to three (3) hours of the ten (10) hour flight based upon the greater weight of the evidence.

Evidenced in the record by the testimony of the following: **Captain Paul Roitsch,** p. 313, In. 13-17. **Leonard Zwerling, M.D.,** p. 349, In. 10-13; p. 526, In. 5-7; P. 531, In. 20-21. **Peter Segall, M.D.,** p. 361, In. 9-11; p. 368, In. 24-25; p. 369, In. l-22; p. 376, In. 13-14; p. 535, In. 8-11; p. 536, ln. 3-25; p. 537, In. 1; p. 545, In. 6-9. **Plaintiffs, Exhibit 3,** record p. 390, In. 16-21. **Samuel Fiscmann, M.D.,** p. 202, ln. 7-10; p. 203, In. 1-21; p. 204, In. 3-17; p. 205, ln. 4-16; p. 409, In. 22-24; p. 421, In. 16-21; p. 422, In. 12-15; p. 423, In. 24-25; p. 425, In. 6-12; p. 429, In. 1-6; p. 430, In. 22-24. **Leonard Sommer, M.D.,** p. 434, In. 18-25; p. 438, In. 3-8; p. 440, In. 4-21; p. 441, In. 12-14; p. 452, In. 7-14; p. 463, In. 12-20. **Jan Holloway,** p. 169, In. 10-12; p. 170, In. 12-23, ln. 25; p. 171, In. 1-2, In. 18-21; p. 172, In. 5, In. 8-13, In. 17-22; p. 173, In. 4-5; p. 174, In. 7-12; p. 175, ln. 6-12; p. 176, In. 7-10; p. 177, In. 10-19; p. 473, In. 14-17, In. 20-22; p. 47G, In. 217; p. 477, ln. 3-9, In. 19-25; p. 478, In. 1-3, In. 11-15; p. 479, In. l-12, In. 15-25; p. 480, In. 1-2, ln. 10-25; p. 481, In. 1-5. **Josie Curry,** p. 47, In. 15-25; p. 48, In. 1-18; p. 49, In. 9-12, In. 20-23; p. 51, In. 2-15, ln. 24-25; p. 52, In. 1-6, In. 14-16; p. 53, ln. 12-14, ln. 19-22; p. 54, ln. 4-12, In. 18-25; p. 55, In. 1-2; p. 56, In. 15-16; p. 57, In. 17-2S; P. 58, In. 17-25; p. 59, In. 1-4, p. 60, In. 8-16, In. 24-25, p. 61, ln. 1, In. 5-17; p. 65, In. 24-25. **Leonard Krys,** p. 107, ln. 7-25; p. 108, ln. 1-23; p. 110, In. 6-20; p. 111, In.

8-12, ln. 20-25; p. 112, ln. 3-24; p. 113, In. 1-9; p. 114, In. 17-19; p. 116, In. 8-22; p. 137, ln. 11-25; p. 138, ln. 1-17; p. 139, ln. 19-25; p. 140, In. 1-14, In. 24-25; p. 141, ln. 1-2; p. 142, In. 21-25; p. 143, ln. 1-24; p. 144, In. 6-12; p. 145, ln. 2-6, ln. 17-25; p. 146, In. 1-7, In. 20-25; p. 147, In. 1-17; p. 152, In. 10-22; p. 162, in. 15-25; p. 163, In. 1-2, ln. 8-11, In. 18-19. **Jurgen Freund**, p. 190, In. 16-22; p. 191, ln. 9-11, ln. 20-21; p. 194, ln. 22-25; p. 195, ln. 1-6, In. 12-18; p. 197, ln. 1-3, ln. 7-25. **Christian Maikowski, M.D.**, p. 212, ln. 16-23; p. 213, ln. 5-10, In. 21; p. 214, ln. 14-21; p. 215, ln. 6-8, ln. 12-16; p. 220, In. 19-24; p. 222, ln. 1-7.

9. LEONARD KRYS sustained significant permanent injury as a direct result of the failure on the part of LUFTHANSA's flight captain in failing to land the aircraft at an available airport so that passenger LEONARD KRYS could receive needed thrombolytic care.

Evidenced in the record by the testimony of the following: Leonard Zwerlingi M.D., p. 350, In. 22-25; p. 351, In. 1; p. 352, In. 6-10; p. 354, ln. 1-5, In. 13-25; p. 355, In. 1, In. 14-20; p. 360, In. 1-6; p. 522, In. 8-16; p. 527, In. 4-6; p. 532, In. 23-25; p. 533, In. 1-8. **Peter Segall, M.D.**, p. 363, In. 24-25;
p. 364, In. 1-11; p. 3GS, In. 14-24; p. 370, ln. 18-21, In. 25; p. 371, In. 1-8; p. 372, In. 8-12. **Samuel Fischmann, M.D.**, p. 411, In. 3-4. **Leonard Sommer, M.D.**, p. 446, In. 19-22; p. 447, In. 3-9; p. 448, In. 3-8, ln. 14-19; p. 454, In. 2-7, In. 16-18; p. 463, In. 23-25; p. 464, In. I-4; p. 466, In. 23-25; p. 467, In. 1-8. **Christian Maikowski, M.D.**, p. 218, In. 15-23; p. 219, In. 6-25.

10. LEONARD KRYS sustained significant anterior chamber heart wall damage as a direct result of the delay in his receiving proper cardiovascular care.

Evidenced in the record by the testimony of the following: **Leonard Zwerling, M.D.,** p. 350, In. 22-25; p. 351, In. 1; p. 352, In. 6-10; p. 353, In. 3-8; p. 354, In. 1-5, In. 13-25; p. 355, In. 1, In. 14-20; p. 357, In. 20-25; p. 358, In. 1-2, In. 14, In. 20-21; p. 360, In. 1-6; p. 522, In. 8-16; p. 527, In. 4-6; p. 532, In. 23-25; p. 533, In. 1-8. **Peter Segall, M.D.,** p. 363, In. 24-25; p. 364, In. 1-11; p. 365, In. 14-24; p. 370, In. 18-21, In. 25; p. 371, In. 1-8; p. 372, In. 8-12. **Leonard Sommer, M.D.,** p. 446, In. 19-22; p. 447, In. 3-9; p. 448, In. 3-8, In. 14-19; p. 454, In. 2-7, In. 16-18; p. 456, In. 17-20; p. 439, In. 1-5; p. 463, In. 23-25; p. 464, In. 1-4; p. 466, In. 23-25; p. 467, In. 1-8. **Christian Maikowski, M.D.,** p. 217, In. 4-6, In. 17-19, In. 23-25; p. 219, In. 6-25.

11. As a direct and proximate result of LUFTHANSA's negligence, LEONARD KRYS incurred medical expenses and related expenses in the amount of $21,295.23, and will incur further medical and related expenses in the future.

Evidenced by Plaintiffs, Exhibits 9 and 11 and by the testimony of the following:
Leonard Sommer, M.D., p. 464, In. 22-25; p. 465, In. 1-7. **Leonard Zwerling, M.D.,** p. 523, In. 25; p. 524, In. 1-6, In. 10-14. **Leonard Krys,** p. 118, In. 2-6, In. 1-8-25; 119, In. 1, In. 17-24; p. 128, In. 11-24.

12. As a direct and proximate result of LUFTHANSA's negligence, LEONARD KRYS suffered severe, grievous and permanent injuries.

Evidenced in the record by the testimony of the following: **Leonard Zwerling, M.D.,** p. 353, In. 3-8; p. 354, In. 18-25; p. 355, In. 1, In. 14-20; p. 356, In. 23-25; p. 357, In. 3-7, In. 11, In. 20-25; p. 358, In. 1-2, In. 14, In. 20-21; p. 360, In. 16; p. 516, In. 23-25; p. 517, In. 1-6; p. 522, In.

8-16; p. 526, In. 18-24; p. 527, In. 4-6; p. 532, In. 1-6, In. 13-17; In. 23-25; p. 533, In. 1-8. **Peter Segall, M.D.**, p. 361, In. 24-25; p. 362, In. 1-18; p. 364, In. 24-25; p. 365, In. 1-6, In. 14-24; p. 373, In. 1-7, In. 15-24; p. 374, In. 19-22, p. 375, In. 4-5,
In. 7-15; p. 384, In. 7-10; p. 539, In. 21-25; p. 540, In. 1-3. **REBECA KRYS**, p. 393, In. 17-18; p. 402, In. 8-18; p. 403, In. 5-8. **Leonard Sommer, M.D.**, p. 454, In. 2-7, In. 16-18; p. 456, In. 17-20, In. 23-25; p. 457, In. 1; p. 459, In. 1-5. p. 466, In. 23-25; p. 467, In. 1-15; p. 468, In. 2. **Leonard Krys**, p. 104, In. 20-24; p. 117, In. 11-23; p. 128, In. 11-24; P. 129, In. 2-19; p. 130, In. 2-15; p. 131, In. 10-14; p. 148, In. 9-20; p. 164, In. 3-19. **Alejandro Krys**, p. 182, In. 9-12; p. 183, In. 3-10, In. 19-25; p. 184, In. 1-3, In. 18-25; p. 185, In. 1-2, In. 17-25; p. 186,In. 1-4, In. 20-25; p. 187, In. 1-5. **Christian Maikowski, M.D.**, p. 217, In. 4-6, In. 17-19; p. 218, In. 15-23; p. 219, In. 6-25.

13. As a direct and proximate result of Lufthansa's negligence, Leonard Krys' life expectancy has been significantly reduced.

Evidenced in the record by the testimony of the following: **Leonard Zwerling, M.D.**, p. 355, In. 14-20; p. 358, In. I-21; p. 359, In. 6-13; p. 520, In. 21-25; p. 521, In. 1. **Peter Segall, M.D.**, p. 361, In. 24-26; p. 362, In. 1-5, In. 14-25; p. 363, In. 1-18; p. 364, In. 24-25; p. 365, In. 1-6; p. 374, In. 23-25; p. 375, In. 1-5.

14. As a direct and proximate result of Lufthansa's negligence, Leonard Krys' life expectancy is significantly less than the average heart attack victim who suffers from ischemic heart disease due to the large amount of heart muscle and reserve Leonard Krys has lost.

Evidenced in the record by the testimony of the following:

Peter Segall, M.D., p. 362, ln. 13-25; p. 363, In. 21-18, p. 364, ln. 24-25; p. 365, ln. 1-6.

15. As a direct and proximate result of Lufthansa's negligence Leonard Krys' chance of future complications and future cardiovascular problems is significantly increased.

Evidenced in the record by the testimony of the following: **Peter Segall, M.D.,** p. 361, ln. 22-25; p. 362, ln. 1-5, ln. 13-25; p. 363, In. 1-18; p. 364, ln. 24-25; p. 365, ln. 1-6; p. 374, ln. 23-25; p. 375, ln. 1-5.

16. As a direct and proximate result of LUFTHANSA's negligence, REBECCA KRYS has been deprived of spousal services, society and comfort of her husband, LEONARD KRYS.

Evidenced in the record by the testimony of the following: **Rebecca Krys**, p. 394, ln. 8-25; p. 395, ln. 1, ln. 13-16; p. 396, ln. 12-25; p. 397, ln. 4-14, ln. 21-23; p. 398, In. 11-16; p. 400, ln. 2-4, In. 8-13; p. 401, ln. 16-24; p. 402, In. 8-23; p. 403, ln. 11-18, ln. 23-25.

17. As a direct and proximate result of Lufthansa's negligence, LEONARD KRYS is a changed man; he suffers from constant fatigue and is nearly always in a depressed state of mind.

Evidenced in the record of by the testimony of the following: **REBECCA KRYS,** p. 393, ln. 13-18; p. 402, ln. 13-23; p. 403, ln. 1-8.

18. LEONARD KRYS' physical and emotional problems and limitations occurring just after and as a result of Lufthansa's negligence have had a profound and negative impact on REBECA KRYS' lifestyle and wellbeing.

Evidenced in the record by the testimony of the following: Rebecca Krys, p. 402, ln. 19-23; p. 403, ln. 9-25.

19. LUFTHANSA is entitled to a set-off, in accordance with Florida Statute §768.76 and agreement of the parties, in the amount of $1,724.98 paid by collateral sources toward medical and related expenses incurred by Plaintiffs, LEONARD KRYS and REBECCA KRYS.

20. Plaintiffs are not entitled to an award of punitive damages in that Lufthansa's conduct did not rise to the level of callous, cruel, careless, willful

and/or reckless indifference to the safety, welfare, health and well being of its passenger, LEONARD KRYS.

CONCLUSIONS OF LAW

1. LUFTHANSA, as a common carrier, owed LEONARD KRYS the duty to exercise the highest degree of care for his safety as a passenger on flight 463, on November 30, 1991.

2. LUFTHANSA breached its duty of careand as a direct and proximate cause result of that breach, LEONARD KRYS suffered severe and grievous injuries and considering the extent of injuries, past and future pain and suffering and residual disability LEONARD KRYS is entitled to compensatory damages in the amount of one million eight hundred thousand dollars (1,800,000.00).

3. As a direct and proximate result of LUFTHANSA's negligence, REBECCA KRYS has been and continues to be deprived of the spousal services, society and comfort of her

husband, LEONARD KRYS, and is entitled to $600,000.00 for loss of consortium in the past and the future, as compensatory damages for REBECCA KRYS.

4. LUFTHANSA, through its employees, agents and/or servants, did not exhibit a callous, cruel, careless, willful and/or reckless indifference to the safety, welfare, health and well being of its passenger, LEONARD KRYS such as would warrant a punitive damage award. In White Construction Co., Inc. v. Dupont, 455 So2d 1026 (Fla. 1984) the Florida Supreme Court reiterated the standard to be met to justify the imposition of punitive damages: "[t]he character of negligence necessary to sustain an award of punitive damages must be of a 'gross and flagrant character, evincing reckless disregard of human life, or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them."' Id. at 1028-29 (quoting Carraway V. Revell, 116 So2d 16,20 n.12 (Fla. 1959)). This Court finds LUFTHANSA'S actions to fall outside the standard enunciated above.

5. The Warsaw Convention does not apply when a passenger's injury results from the normal, expected operation of the aircraft. The United States Supreme Court in Air France v. Saks, 470 U.S. 392 (1985), defined an "accident" in accordance with the Warsaw Convention as an unexpected or unusual event or happening that is external to the passenger.

6. The post-heart attack treatment of passenger LEONARD KRYS was not an "accident" within the meaning

of the Warsaw Convention as defined by the United States Supreme Court. See Order Denying Defendant's Motion for Summary Judgment, page 3, entered by Judge Daniel T.K. Hurley on December 17, 1994.

7. The Warsaw Convention is not applicable to the facts of this case and the law to be applied is that of the State of Florida. Recently Judge Lenore C. Nesbitt, in Dotti v. American Airlines, U.S. Dist. Ct. Case No. 94-0089-CIV-NESDITT, held that "if no accident occurs within the meaning of the Warsaw Convention" then the Warsaw Convention does not apply and, based on choice of law analysis, Florida law applied to the negligence claim. See also Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984); Fischer v. Northwest Airlines, Inc., 623 F. Supp. 1064 (N.D.
Ill. 1985); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702 (S.D.N.T. 1972).

8. The state law negligence claim is not preempted by the Federal Aviation Act which preempts state laws relating to rates, routes, or services. See Order Denying Defendant's Motion for Summary Judgment, page 3, entered by Judge Daniel T.K. Hurley on December 17, 1994. The recent decision of Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993) stands four square for the proposition that the preemption provision of the Airline Deregulation Act, incorporated into the FAA, was not intended to preclude common law negligence actions. The only Florida decision on the subject of federal preemption, Martin v. Eastern Airlines, Inc., 630 So. 2d 1206 (Fla. 4th DCA 1994), followed the decision in Margolis. The Court in Martin held that § 130S (a) (1) did not preempt common law actions brought against airlines.

9. Negligence, if any, on the part of Dr. Samuel Fischm-

ann and/or any third party was not an efficient intervening cause breaking the chain of causation between LUFTHANSA's negligence and Plaintiffs' damages. Any negligence on the part of Dr. Samuel Fischmann does not absolve-LUFTHANSA of liability. The question of whether to absolve a negligent actor of liability is more a question of responsibility. Gibson v. Avis Rent-A-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980) (citing W. Prosser, Law of Torts, Section 44 (4th Ed. 1971); L. Green, Rationale of Proximate Cause, 14270 (1927); Comment, 1960 Duke L. J. 88 (1960)) . The general rule of law regarding whether an intervening cause is a superseding cause is that an initial tortfeasor will he relieved from liability where the Plaintiff's damages were brought about by an independent, efficient intervening cause. Gibson, 386 So. 2d at S22. An intervening cause is "efficient", however, only if it is truly and completely independent of, and not in any way "set in motion" by, the original tortfeasor's negligence. Waters v. ITT Rayonier, Inc., 493 So. 2d 67, 68 (Fla. lst DCA 1986) . See also Townsend v. Westside Dodge, Inc., 642 So. 2d 49 (Fla. lst DCA 1994,) . If an intervening cause is foreseeable the original negligent actor may still be held liable. Gibson, 386 So. 2d at 522. The question of whether an intervening cause is foreseeable is for the trier of fact. Id (citing, Vining v. Avis Rent-A-Car Systems, Inc., 354 So. 2d 54 (Fla. 1977); Exchange Bank of St. Augustine v. Florida National Bank of Jacksonville, 292 So. 2d 361 (Fla. 1974); Cruz v. Hundley, 371 So. 2d 698 (Fla. 3rd DCA 1979); Railway Express Agency, Inc. v. Garland, 269 So. 2d 708 (Fla. Ist DCA 1972); Savarese v. Hill, 128 So. 2d 775 (Fla. 3rd DCA 1961)).

10. LUFTHANSA is liable because its conduct, by and through its employees, servants and/or agents, set in motion a chain of events resulting in injury to Plaintiffs. A person who creates a dangerous situation may he deemed negligent

because he violates a duty of care. Gibson v. Avis Rent-A-Car Systems, Inc., 386 So. 2d 520, 522 (Fla. 1980). It is not necessary for the initial tortfeasor to foresee the exact nature of the ensuing injury or the precise manner in which it occurs. Townsend v. Westside Dodge, Inc., 642 So. 2d 49, 50 (Fla. 1st DCA 1994) (emphasis added).1

11. LUFTHANSA, by and through its employees, servants and/or agents, deviated from accepted air industry standards and practices.

DONE AND ORDERED this 24th day of October 1995, in Chambers, at Miami, Florida.

See Worthington v. U.S., 21 F. 3d 399, 404 (Ilth Cir. 1994) for a detailed analysis and discussion of Florida negligence principles regarding intervening causes.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEONARD KRYS and
REBECA KRYS CASE NO. 92-2488- C I V - HURLEY

Plaintiffs,

vs

LUFTHANSA GERMAN AIRLINES

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon the defendant's motion for summary judgment. Having reviewed the record, the memoranda and oral argument of counsel, and relevant authorities, the undersigned enters the following order.

On November 30, 1991, Plaintiff, Leonard Krys, suffered a heart attack on a Lufthansa international flight travelling from Miami, Florida to Frankfurt, Germany. Plaintiff seeks damages for the alleged post-heart attack negligence of the flight crew and pilot. Defendant, Lufthansa, has moved for partial summary judgment and seeks a determination that the alleged negligence constitutes an "accident" under Article 17

of the Warsaw Convention. Such a determination would limit the plaintiffs damages to $75,000 and preempt the state common law claim of negligence. In addition, defendant seeks a determination that the Federal Aviation Act preempt the plaintiff's state law claims.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. " Wouters v. Martin County, Fla., 9 F. 3 d 924, 928 (11th Cir. 1993) (quoting Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 587 (1986). Where, as here, the non-moving party bears the burden of proof on an issue at trial, the moving party, in order to prevail, must do one of two things: show that the non-moving party has no evidence to support its case, or present "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc).

It is inappropriate at the summary judgment stage for the court to weigh the evidence and determine the truth of the matter. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986). Rather, the court's function is to determine whether there exists an issue for trial. A review of the record reveals that defendant's motion for summary judgment must be denied.

Article 17 of the Warsaw Convention provides:

The carrier shall be liable for damage sustained in the

> event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the *accident* which caused damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Warsaw Convention 49 U.S.C.A. § 1502 note (West 1976) (emphasis added). The Supreme Court has defined "accident" as an "unexpected or unusual event or happening that is external to the passenger." Air France v. Saks, 470 U.S. 392, (1985). "[I]t is the ***cause*** of the injury that must satisfy the definition rather than the occurrence of the injury alone." Id. at 399 (emphasis in original). The Warsaw Convention does not apply when a passenger's injury results from the normal, expected operation of the aircraft. Id at 406. The court finds that the post-heart attack treatment of passenger Leonard Krys was not an "accident" within the meaning of the Warsaw Convention as defined by the United States Supreme Court. *See* Air France v. Saks, 470 U.S. 392, (1985), *see also* Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984) (flight crew's failure to permit a passenger to use empty seats to lie down and administer a self-help remedy to his hiatal hernia, not considered an unusual or unexpected happening within the meaning of the Warsaw Convention).

The court also finds that a state law negligence claim is not preempted by the Federal Aviation Act which preempts state laws "relating to rates, routes, or services." *See*

49 U.S.C. § 1305 (West Supp. 1994). It is hereby

ORDERED and ADJUDGED that defendant's motion for summary judgment is **DENIED, DONE and SIGNED** in Chambers at West Palm Beach, Florida this 17th day of

December 1994.

Daniel T.K. Hurley
United States District Judge

Copies furnished to:
John N. Romans
Jerome A. Pivnik
Tod Aronovitz

FILED
JAN 15 1998
OFFICE OF THE CLERK

No. 97-956

In The

Supreme Court of the United States

October Term, 1997

LUFTHANSA GERMAN AIRLINES,

Petitioner,

vs.

LEONARD KRYS AND REBECA KRYS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHERE AN AIRLINE PASSENGER SUFFERS A HEART ATTACK DURING A FLIGHT AND THE DAMAGE TO HIS HEART IS AGGRAVATED BY THE NEGLIGENCE OF THE CREW, DOES THE AGGRAVATION CONSTITUTE AN "ACCIDENT" UNDER THE WARSAW CONVENTION, A TREATY OF THE UNITED STATES?

2. IN THIS CASE WHICH OCCURRED DURING AN INTERNATIONAL FLIGHT OVER THE HIGH SEAS, IF THIS COURT ACCEPTS *CERTIORARI* AND DETERMINES THAT THE ACTION IS GOVERNED BY THE WARSAW CONVENTION, SHOULD THIS COURT ADDRESS THE ADDITIONAL QUESTION OF WHETHER, IN ACTIONS GOVERNED BY THE WARSAW CONVENTION, ISSUES NOT SPECIFICALLY ADDRESSED IN THE CONVENTION SHOULD BE DECIDED UNDER GENERAL MARITIME LAW, OR SHOULD THE DISTRICT COURT ADDRESS THAT CONTENTION IN THE FIRST INSTANCE ON REMAND?

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BRIEF IN OPPOSITION

The respondents, Leonard and Rebeca Krys, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 119 F. 3d 1515 (1996), and is reprinted in the petitioner's Appendix at A-4.

STATEMENT OF THE CASE

1. The Proceedings Below.

As the Court of Appeals pointed out (A-8 to A-9 n.8), Petitioner Lufthansa's initial position in the district court was the direct opposite of the position which Lufthansa later advanced in the district court, the court of appeals, and this Court. Lufthansa initially moved for summary judgment on the ground that Mr. Krys' "heart attack was not the result of an 'accident', [and] thus his claims are not cognizable under the Warsaw Convention";[1] and Lufthansa also argued that "[t]he failure to provide medical treatment to a passenger is not an accident under the Warsaw Convention" (R2-75-7-8).[2] The plaintiffs responded by citing what the Court of Appeals called the "overwhelming contrary case law" (A-9 n.8), holding that if an action is not governed by the Warsaw Convention,

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted at 49 U.S.C.A. § 40105 (1997).

[2] The citation is to Volume II of the Record on Appeal in the Court of Appeals, Document No. 75, pages 7-8.

then the plaintiffs are free to pursue their common-law remedies (R2-89-6-7). Recognizing its strategic error, Lufthansa switched sides in its reply memorandum, arguing for the first time that although Mr. Krys' heart attack itself was not an accident cognizable under Warsaw, "[i]f there was post-heart attack crew negligence, and if this negligence did aggravate the injury, this negligence would certainly constitute a Warsaw Convention 'accident' " (R2-94-1). The district court denied the motion for summary judgment, finding that "the post-heart attack treatment of passenger Leonard Krys was not an 'accident' within the meaning of the Warsaw Convention as defined by the United States Supreme Court" (A-58); and the magistrate reiterated that conclusion in the Findings of Fact and Conclusions of Law (A-52 to 53).

As the Court of Appeals noted (A-24 to A-25 n.19), given that Lufthansa had timely argued for admiralty law only on the assumption that the Warsaw Convention was applicable, raising no timely contention that admiralty law should govern even if the Convention were not applicable, the district court's ruling on the non-applicability of Warsaw necessarily mooted the single question of admiralty law timely presented by Lufthansa. As the Court of Appeals noted (A-24 to A-25 n.19), "all the pretrial documents . . . clearly contemplate that, absent preemption by the Warsaw Convention or the Federal Aviation Act,[3] state law would apply"; "once the district court rejected appellant's preemption arguments, all parties and the court understood that the case would be tried

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[3] As the Court of Appeals noted (A-7 n.5), Lufthansa dropped its FAA pre-emption argument on appeal.

under state law negligence principles"; it was only "[t]wo months *after* the trial, in its proposed Findings of Fact and Conclusions of Law, [that] Lufthansa cited both Florida cases and maritime cases in support of its argument that Lufthansa did not breach its duty of care" (emphasis in original);[4] and "[e]ven then, the assertion was made in a short paragraph consisting only of a conclusory assertion and a citation to two cases." The plaintiffs argued in response "that the point was waived," and the Court of Appeals construed the district court's order "as a rejection on the basis of untimeliness, which is amply warranted. Only after the court's order did Lufthansa finally present a fully developed argument that maritime law should apply" (A-25 n.19).

Moreover, as the Court of Appeals further noted (A-24 n.19), Lufthansa "failed to argue this point as clearly as it should have in its initial brief on appeal," contending only "that maritime law should fill the interstices not covered by the Convention." Lufthansa argued only "in its reply brief and at oral argument that maritime law should govern this case even if the Warsaw Convention does not apply." *Id.* In light of Lufthansa's omissions both at the trial level and at the appellate level, the Court of Appeals "decline[d] to address the question of whether maritime law should have been applied" (A-25 n.19). Having affirmed the district court's ruling that the instant

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[4] Lufthansa notes (petition at 6) that the point was made in its proposed findings, without informing the Court that its proposed findings were filed two months after the trial, and raised the point for the first time.

case is not governed by the Warsaw Convention, it therefore was unnecessary for the Court of Appeals to consider whether in proper cases the Warsaw Convention will borrow principles of admiralty law.

2. The Plaintiffs Presented Overwhelming Evidence that Lufthansa Was Negligent in Failing to Recognize the Manifest Symptoms of Mr. Krys' Heart Attack, and that the Resulting Delay in Treatment Significantly Aggravated its Effects.

As the Court of Appeals recognized, for the purpose of adjudicating Lufthansa's jurisdictional argument, "we need only sketch out the nature of the case," and "we resolve all disagreements regarding the facts in favor of the district court's findings" (A-5 n.1). In this Court, Lufthansa has argued only the question of Warsaw jurisdiction and the dependent question of whether in proper cases Warsaw borrows maritime law; neither question directly implicates the underlying facts. Therefore, we will not rebut at length Lufthansa's self-serving recitation of its own evidence (petition at 3-4).

We refer the Court to the district court's findings (A-38 to A-51), based upon the evidence, summarized by the Court of Appeals (A-18 to 33), that Lufthansa was negligent notwithstanding a physician passenger's self-serving disclaimer,[5] in failing to recognize that Mr. Krys

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[5] The passenger, Dr. Fischmann, was heading back to Germany after a vacation, and was scheduled to see patients the following morning; thus, he would have been significantly inconvenienced if the flight had been diverted (R5-201).

was suffering a heart attack, and that Lufthansa's negligence contributed substantially to Mr. Krys' significant injuries. Beginning between an hour and two hours into the flight (R5-60, 63, 82-83, 107, 175, 212-13; R6-369; R7-477, 479, 485), Mr. Krys was observed by two other passengers to experience difficulty breathing; unrelenting perspiration, through his clothing; a pallor turning his face white or gray; an upset stomach; severe nausea; dizziness; confusion; and beginning with his second trip to the bathroom, "unbearable, crushing, excruciating" chest pain (R5-138), which radiated into his arms and other parts of his body (R5-107-08, 143), which was "constant" (*id.*) from that time until Mr. Krys was given an analgesic after the plane had landed in Frankfurt (R5-117), and which was so unbearable that he was forced to remain in almost constant movement while either sitting or walking throughout the plane – his arms behind his head or raised in the air (R5-48-51, 57-58, 61, 107-08, 110-12, 114, 116, 137-38, 140-41, 146, 163, 170, 172, 174-77; R7-473, 476-80, 508-09). Mr. Krys reported all of these symptoms both to the physician passenger, Dr. Fischmann, and to the purser (R5-49, 59, 111, 114, 137, 140, 143-44). Even Lufthansa's witnesses conceded what Mr. Krys and the two eyewitnesses knew (R5-54, 59, 65, 112; R6-311; *see* R5-176; R7-481-82) – that the symptoms reported by Mr. Krys and confirmed by the two eyewitnesses overwhelmingly signaled a heart attack (R5-85-86, 99, 204, 243; R7-421-22). Indeed, Lufthansa's flight operations manual (*see* Plaintiffs' Exhibit 3) lists precisely these symptoms as the symptoms of a heart attack (R5-85-86; R7-390-91); and Lufthansa's employees were trained to recognize these symptoms (R5-190; R7-463). Both the

plaintiffs' experts (R5-214; R6-313-14, 343, 349, 369) and the defendant's expert (R7-440, 452) agreed that Mr. Krys exhibited the classic symptoms of a heart attack. Some of those symptoms were inconsistent with mere angina (R7-391); not surprisingly, they were not relieved by nitroglycerin (R5-54, 56-57, 61, 110-12, 114), which would have relieved angina within a few minutes (R5-196-97, 214-15; R6-327).

On the basis of the foregoing evidence alone, the factfinder certainly could have concluded that notwithstanding Dr. Fischmann's advice, Lufthansa's employees knew or should have known that Mr. Krys was suffering a heart attack, and thus that they were required by common sense and by Lufthansa's operations manual (*see* Plaintiffs' Exhibit 2) to abort the flight at once (R5-83-85; R7-389-90, 556). In addition, a Lufthansa official admitted that the symptoms reported by Mr. Krys required Lufthansa to land the plane (R5-83), and the plaintiffs offered expert testimony that Lufthansa was negligent for failing to follow its own procedures (R6-311). Moreover, wholly apart from Lufthansa's internal policies, the plaintiffs' experts testified that its obligations were not relieved by Dr. Fischmann's intervention (R6-302, 311, 341-42); that Lufthansa was negligent in failing to divert the flight to the nearest airport (R6-304, 337; *see also* R7-542-53); and that Lufthansa was negligent in failing to ascertain Dr. Fischmann's knowledge or training (R6-301-337-38; *see* R5-92; R7-275, 554, 563); failing to verify the doctor's impression by monitoring the passenger more closely (R6-302-310, 312, 340; *see* R5-88); and forbidding Mr. Krys' request to lie down in the galley between business class and tourist class (*see* R5-112-13;

R6-249) – a decision which the expert found "particularly reprehensible" (R6-345; *see* R7-543-44). As the Court of Appeals found, there is substantial record evidence that Lufthansa was negligent in failing to heed Mr. Krys' manifest symptoms; and there is substantial evidence that the effects of his heart attack were significantly worsened by the delay occasioned by that negligence (*see* R5-51, 54-55, 84, 114-15, 175, 219; R6-304-10, 353-55, 360, 364-65, 371).

ARGUMENT

1. The Federal Decisions Unanimously Support the Court of Appeals' Conclusion that Lufthansa's Negligence in Failing to Treat Mr. Krys' Natural Condition Was Not a Warsaw Accident; a Single Contrary State-Court Decision on This Federal Question Does Not Warrant This Court's Review.

As the Court of Appeals recognized (A-11 to A-15), every federal court to consider the present question – whether an airline's asserted negligence in reacting or failing to react to a passenger's natural condition constitutes a Warsaw "accident" – has held that the Convention is not implicated by such an event. *See Abramson v. Japan Airlines*, 739 F. 2d 130, 133 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985) (asserted negligence in worsening the passenger's hernia condition was not a Warsaw accident); *Tandon v. United Air Lines*, 926 F. Supp. 366, 369-70 (S.D.N.Y. 1996) (asserted negligence in failing to have oxygen on board for treatment of heart attack); *Fischer v. Northwest Airlines, Inc.*, 623 F. Supp. 1064, 1065-66 (N.D.

Ill. 1985) (asserted negligence in failing to assist a passenger suffering a heart attack). *Cf. Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111 (S.D.N.Y. 1991) (parties agreed that the plaintiff had not alleged a Warsaw accident in the airline's inadequate care, assertedly aggravating the decedent's asthma). *See also Northern Trust Co. v. American Airlines, Inc.*, 96 Ill. Dec. 371, 376, 142 Ill. App. 3d 21, 28, 491 N.E. 2d 417, 422 (1986) (where the plaintiff's decedent alleged that the airline was negligent in responding to a heart attack, the court held that "no accident occurred in this case. An accident has been defined as an unusual or unexpected happening. . . . [The heart condition] was an inherent weakness or disability and was not the result of an unusual or unexpected happening which was connected with the flight"); *Adamsons v. American Airlines, Inc.*, 105 Misc. 2d 787, 791, 433 N.Y.S. 2d 366, 369 (S. Ct. 1980), *aff'd*, 87 A.D. 2d 785, 449 N.Y.S. 2d 487 (S. Ct., App. Div. 1982), *rev'd on other grounds*, 58 N.Y. 2d 42, 457 N.Y.S. 2d 771, 444 N.E. 2d 21 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209 (1983) (in addition to its primary holding that the plaintiff was not a passenger under the Warsaw Convention, the court found "no accident within the meaning of the Convention," because the plaintiff's injury – aggravation of a disability because the airline declined to fly her back to New York for treatment – occurred " 'in accordance with ordinary and routine operating procedures under conditions which were free of any malfunctions or abnormalities . . . ' "), *quoting Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 412 (E.D. Pa. 1977).

No federal court has departed from this line of authority. Only a single New York appellate decision –

Seguritan v. Northwest Airlines, Inc., 86 A.D. 2d 658, 659, 446 N.Y.S. 2d 397, 398 (S. Ct., App. Div.), *aff'd*, 57 N.Y.S. 2d 767, 454 N.Y.S. 2d 991, 440 N.E. 2d 1339 (Ct. App. 1982) – has held that the airline's inattention to a passenger's heart attack constituted a Warsaw accident. However, Lufthansa has cited no authority that a state appellate ruling on a federal question, which of course has no precedential value in any federal court,[6] could warrant this Court's consideration in the face of unanimous contrary authority in the federal system. Typically, in the absence of a federal/state conflict implicating questions of state sovereignty, *see, e.g., Forsyth v. Hammond*, 166 U.S. 506 (1897) (conflicting federal and state-court rulings regarding the validity of an annexation of territory), this Court will accept review to resolve a conflict only between federal Courts of Appeal.[7] Lufthansa has cited no authority that a single state appellate decision on a federal question is sufficient to invoke this Court's authority to resolve a conflict of extant decisions.

Moreover, as the Court of Appeals concluded, although the question may be open to some discussion, Lufthansa has offered no compelling argument that the unanimous line of federal decisions defining a Warsaw

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[6] *See Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[7] *See, e.g., Varity Corp. v. Howe*, ___ U.S. ___, 116 S. Ct. 1065, 134 L. Ed. 2d 130, 138 (1996); *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 656 & n.7 (1974); *Kokoszka v. Belford*, 417 U.S. 642, 643 (1974); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 468 (1974); *Bob Jones University v. Simon*, 416 U.S. 725, 734 (1974).

"accident" conflicts either with the language of the Convention or with *Air France v. Saks*, 470 U.S. 392, 396 (1985), holding that a passenger's loss of hearing, assertedly "caused by the normal operation of the aircraft's pressurization system," was not compensable as a Warsaw "accident." The Court began in *Air France v. Saks* with the language of the Convention, noting that Article 17 compensates death or bodily injury "if the accident which caused the damage" occurred in international air transportation, while Article 18 covers destruction or loss of baggage or goods "if the occurrence which caused the damage" took place in international air transportation. 470 U.S. at 397-98. The difference in language "implies that the drafters of the Convention understood the word 'accident' to mean something different than the word 'occurrence' ", *id.* at 398; and Article 17 also "refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury", *id.* – language through which "the drafters of the Warsaw Convention apparently did make an attempt to discriminate between 'the cause and the effect'; they specified that air carriers would be liable if an accident caused the passenger's injury." *Id.* at 398-99 (emphasis in original).

The Convention does not itself define "accident," but the original French operates as a reference to "the *event* of a person's injury" and "to describe a *cause* of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event. . . . The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event." *Id.* at 400 (emphasis in original). The question, therefore, is "what causes can be

considered accidents," *id.* at 404; and consistent with the language and history of the Convention, the Court agreed with decisions of our "sister signatories" (*id.*) holding that "Article 17 . . . embraces causes of injury that are fortuitous or unpredictable" – that is, "that the passenger's injury be caused by a sudden or unexpected event other than the normal operation of the plane." *Id.* at 404. These sister holdings "are in accord with American decisions which . . . refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of the passenger." *Id.* at 404-05.[8] Thus, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply." *Id.* at 406. In contrast, when the injury "is the product of a chain of causes," "we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id.*

In keeping with this reasoning, the Court of Appeals in the instant case properly concluded (A-14 to A-15) that no link in the chain of events could be said to have

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[8] Among those "American decisions," the Court noted, 470 U.S. at 405, is *Abramson v. Japan Airlines Co.*, 739 F. 2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985), which the Court described as holding that "sitting in airline seat during normal flight which aggravated hernia [was] not an 'accident' ", and which the Court cited for the proposition that the Convention does not cover "routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." 470 U.S. at 405.

constituted "a sudden or unexpected event other than the normal operation of the plane." *Air France v. Saks*, 470 U.S. at 404. To the contrary, Mr. Krys' experience reflected "the peculiar internal condition of the passenger," *id.* at 404-05, and it was aggravated not by "a sudden or unexpected event other than the normal operation of the plane," but rather by the "normal operation of the plane" – that is, by continuation of its scheduled, uninterrupted flight. As the appellate court put it (A-14 to A-15):

> [I]f we substitute a purely factual description of the relevant events in place of the legal conclusion represented by "crew negligence," the conclusion that no "accident" occurred is seen as the more reasonable conclusion. If, in *Abramson*, the aggravating event is having to sit upright in an airline seat throughout the duration of the flight, then it seems clear that the aggravation does not arise from an "unexpected or unusual event" – instead, the aggravation injury arises solely from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." By the same token, if, in the instant case, the aggravating event is the continuation of the flight from its scheduled point of departure to its scheduled point of arrival, then it seems clear that the aggravation injury arises not from an "unexpected or unusual happening," but rather from the "passenger's own internal reaction to the usual, normal, and expected operation of the aircraft."

Thus, the Court of Appeals derived from the unanimous federal decisions its holding that "the proper approach is indeed to look at a purely factual description

of the events that allegedly caused the aggravation injury suffered by the plaintiff" – an approach "in accord with the plain meaning of the phrase 'event or happening' as used in the *Air France* Court's definition of 'accident' and with the manner in which the Court described decisions of the lower courts" (A-15). "In particular, we note that in summarizing the *Abramson* decision in a parenthetical, the Court described the relevant event as 'sitting in airline seat during normal flight' notwithstanding the fact that the plaintiff had attempted to make out the Warsaw Convention claim based on the airline's 'acts or omissions' – i.e., its negligence" (A-15). Thus, "looking solely to a factual description of the aggravating event in this case – i.e., the continuation of the flight to its scheduled point of arrival – compels a conclusion that the aggravation injury was not caused by an 'unusual or unexpected event or happening that is external to the plaintiff' " (A-17).

As the Court of Appeals emphasized, similar reasoning is found throughout the federal decisions on this question. Most recently, in *Tseng v. El Al Israel Airlines, Ltd.*, 122 F. 3d 99, 103 (2d Cir. 1997), *petition for cert. pending*, No. 97-475, in which the passenger was identified as a security risk, and subjected to a personal search which assertedly caused both physical and psychological trauma, there was no Warsaw "accident" in part because "being subjected to a personal search is a distasteful but a routine procedure of international air travel. As such, it cannot be considered an 'accident' regardless of a passenger's subjective reaction to it." Such an event "is part of every passenger's experience," *id.*, and the language of the Convention "does not include illness suffered by the

passenger as a reaction to the ordinary events and procedures of air transportation." *Id.* at 104. *Accord, MacDonald v. Air Canada,* 439 F. 2d 1402 (1st Cir. 1971) (fainting while waiting for baggage); *Scherer v. Pan American World Airways, Inc.*, 54 A.D. 2d 636, 387 N.Y.S. 2d 580 (1976) (sitting in an airline seat during normal flight aggravated passenger's thrombophlebitis). At the least, the *Tseng* court's formulation of the appropriate legal standard is accurate, even if one might debate its application to the facts of *Tseng*. The appropriate question, which must be applied case by case, is whether the plaintiff's condition was caused or aggravated by an extraordinary extrinsic event, or instead by the passenger's internal condition and/or the normal operation of the flight. Even if the application of that standard is debatable in *Tseng*, it is not debatable here.

Here, regardless of the airline's asserted negligence, the passenger's injury was caused not by "a sudden or unexpected event other than the normal operation of the plane," *Air France v. Saks,* 470 U.S. at 404, but rather by "a routine procedure of international air travel." *Tseng v. El Al Israel Airlines, Ltd.*, 122 F. 3d at 103. The unanimous reasoning of the federal decisions is correct, and is consistent with *Air France v. Saks*. No event in the chain of events leading to Leonard Krys' injury resulted from an unusual or unexpected event. No Warsaw accident occurred. No basis for review by certiorari has been presented.

2. In Holding That the Instant Action Is Not Governed by the Warsaw Convention, the Court of Appeals' Decision Cannot Implicate the Question of What Law Applies in a Case Which is Governed by the Warsaw Convention.

In holding that the instant case is not governed by the Warsaw Convention, the Court of Appeals had no occasion to address the question of what law applies in an action which is governed by the Warsaw Convention. As Lufthansa points out (petition at 18), that issue most recently was addressed in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), holding that because the Convention itself is silent on the elements of compensatory damages in an action governed by the Warsaw Convention, the Court should apply whatever choice-of-law formula would exist in the absence of the Convention. Given its holding that the Convention does not apply in this case, the Court of Appeals of course had no occasion to consider what law should apply in an action which is governed by the Convention – on the issue of liability, compensatory damages, attorneys' fees, or anything else. Accordingly, the choice-of-law question would be appropriate for consideration only if this Court were to grant certiorari and reverse the Court of Appeals' determination that this is not a Warsaw case. And even in that event, it seems probable that the Court would remand the case to the Court of Appeals, and eventually to the district court, to consider all issues then arising under Warsaw, including the question of what law applies. This Court repeatedly has declined to consider in the first

instance questions which were not addressed by either the district court or the court of appeals.[9]

As a footnote, we should also acknowledge Lufthansa's protestation (petition at 19-20) that both the district court and the Court of Appeals assertedly ignored its contention that even if this is not a Warsaw case, admiralty law, and not Florida law, should govern the plaintiffs' claims. As we noted above, the Court of Appeals expressly declined to consider Lufthansa's invocation of admiralty law outside the context of a Warsaw action, both because the argument was presented too late in the district court, whose failure to address the point was construed "as a rejection on the basis of untimeliness, which is amply warranted" (A-25 n.19),[10] and because even on appeal, the argument was presented by Lufthansa only "in its reply brief and at oral argument . . . " (A-24 n.19). As we noted above, this Court consistently has declined to consider issues not squarely addressed by the courts below, especially when those issues were not properly presented to the courts below.

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[9] *See, e.g., Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992); *Hudson v. McMillian*, 503 U.S. 1, 12 (1992); *International Brotherhood of Electrical Workers AFL-CIO v. Hechler*, 481 U.S. 851, 862 n.5 (1987); *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 34 (1977); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

[10] *See Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (appellate court's failure to address an issue warrants a presumption that it was not preserved for appellate review).

Therefore, the only issue preserved for this Court's consideration is the issue of whether the plaintiffs' claim should have been governed by the Warsaw Convention, and on that issue, Lufthansa has presented no argument warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 26 1998
CLERK

(3)

No. 97-956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LUFTHANSA GERMAN AIRLINES,

Petitioner,

vs.

LEONARD KRYS AND REBECCA KRYS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF ENCLOSING NEW DECISION IN DIRECT CONFLICT

Petitioner, Lufthansa German Airlines, ("Lufthansa"), respectfully submits this supplemental brief pursuant to Rule 15.8 to bring to the Court's attention *Fischman v. Delta Air Lines, Inc.* 1998 W.L.1418 (2d Cir. Jan. 5, 1998), which is annexed as Appendix A and is in direct conflict with the decision of the Eleventh Circuit below.

THE DECISIONS OF THE SECOND CIRCUIT AND THE NEW YORK COURT OF APPEALS DIRECTLY CONFLICT WITH THOSE OF THE THIRD CIRCUIT AND THE ELEVENTH CIRCUIT BELOW.

The decisions of the Eleventh Circuit below and the Third Circuit in *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3rd Cir. 1984) directly conflict with the decision of the highest court of New York in *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658, 446 N.Y.S.2d 397 (2d Dep't), *aff'd mem*, 57 N.Y.2d 767, 454 N.Y.S.2d 991, 440 N.E.2d 1339 (1982) and that of the Second Circuit in *Fischman v. Delta Air Lines, Inc.*, 1998 W.L. 1418 (2d Cir. Jan. 5, 1998).

In Fischman, a two year old child "began crying and touching her ear" while the plane was descending (A-2). "The child, who had a cold, was evidentially suffering from the change of air pressure." *Id.* A flight attendant suggested to the child's mother "that a cup containing a warm cloth be placed over the ear." *Id.* When the cup was applied, "scalding water in the cup dripped on the child's neck and shoulder, causing burns." *Id.*

The Second Circuit, citing *Air France v. Saks*, 470 U.S. 392, 406 (1985), noted: "It is enough if in the chain of causation there is 'some link' that was an unusual or unexpected event external to the passenger" (A-4).

Under similar circumstances, the New York Court of Appeals had affirmed in *Seguritan* that the "'accident' is not the heart attack." "Rather, it is the alleged aggravation of

decedent's condition by the negligent failure" of the crew. The Second Circuit in *Fischman* held that "the injury here is not the earache, but the application of scalding water to treat it" (A-5). Petitioners submit in this case that the "accident" was not the heart attack, but the negligence of the Lufthansa crew in not making an emergency landing. In the words of the *Fischman* court (A-7):

> [A] claim does allege an "accident" if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an "accident" if those procedures or operations are carried out in an unreasonable manner.
>
> * * *
>
> The application of a hot compress to [the child's] ear may have been a routine measure for relieving the pain suffered by passengers incident to the decent of the aircraft; but the measure was carried out in a way (using excessive scalding water) that was not expected, usual, normal, or routine.

The Eleventh Circuit below found that the Lufthansa crew was negligent in its care of Mr. Krys after his heart attack, and that Lufthansa's negligence proximately caused an aggravation of the injury to Krys' heart wall; yet the Eleventh Circuit found no "accident." The Third Circuit ruled the same way in *Abramson.* In direct conflict, the Second Circuit in *Fischman* and the New York Court of Appeals in *Seguritan* held that these facts, as a matter of Federal law, did constitute an "accident."

CONCLUSION

Certiorari should be granted to resolve a widening conflict among the circuits concerning this recurring issue of treaty interpretation.

Respectfully submitted,

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Dated: January 1998

Appendix A

Penina FISHMAN, an infant by her mother and natural guardian, Michelle Fishman; Michelle Fishman, individually, Plaintiffs-Appellants,

v.

DELTA AIR LINES, INC., Defendant-Appellee.

Nos. 1818, 2038, Dockets 96-9345, 96-9457.

United States Court of Appeals, Second Circuit.

Argued June 3, 1997.

Decided Jan. 5, 1998.

Appeal from a final judgment of the United States District Court for the Southern District of New York (Cedarbaum, J.), dismissing the complaint. The district court held that plaintiffs' alleged injuries were caused by an "accident" within the meaning of the Warsaw Convention, and that the time limitation for bringing suit under the Convention was not subject to *tolling* for infancy under New York law. Affirmed.

Elliot B. Pasik, Mineola, NY (Carole A. Burns & Associates, Mineola, NY, on the brief), for Plaintiffs-Appellants.

George P. McKeegan, New York City (Thomas A. McShane, Elizabeth B. Kane, McKeegan, McShane & Drago, P.C., New York City, on the brief), for Defendant- Appellee.

Before: MESKILL, JACOBS, and LEVAL, Circuit Judges.

JACOBS, Circuit Judge:

*1 Infant plaintiff Penina Fishman, while travelling as a passenger aboard an international flight, was scalded when a stewardess applied an over-hot compress to alleviate the child's earache. The child and her mother sued Delta Air Lines, Inc. ("Delta") under the Warsaw Convention, as well as for negligence and intentional torts in applying the compress, failing to advise the child's mother of the injury while

the plane was aloft, and refusing to provide medical assistance when the plane landed. On this appeal, we consider whether all the child's claims are preempted by the Warsaw Convention and, if so, whether the two-year period of limitation under the Warsaw Convention is tolled (under New York law) during the child's minority. There are some other and subsidiary questions, including whether the mother's claims for emotional harm are similarly preempted.

The complaint was filed in the United States District Court for the Southern District of New York two years and three months after the flight. Judge Cedarbaum granted Delta's motion to dismiss on the ground that plaintiffs' suit was untimely.

We affirm.

BACKGROUND

We summarize the facts that bear upon the issues addressed on appeal, and we assume that the material facts alleged in the complaint are true. See Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd., 968 F.2d 196, 198 (2d Cir.1992) (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

On November 9, 1993, plaintiff Michelle Fishman and her two children were aboard a Delta flight from Tel Aviv to New York with a stopover at Orly Airport in Paris. Mrs. Fishman sat between her children with Penina, two years old, in the aisle seat on her right. During the descent at Paris, Penina began crying and touching her ear. The child, who had a cold, was evidently suffering from the change of air pressure. The stewardess suggested that a cup containing a warm cloth be placed over the ear. When this poultice was applied to Penina's right ear, scalding water in the cup dripped on the child's neck and shoulder, causing burns. Mrs. Fishman asked the crew to administer first aid before disembarkation, but the crew refused to do so. After a further confrontation at the gate, the child was rushed to Orly's first aid station and treated with topical ointment and a bandage.

The plaintiff mother and child arrived in New York on November 9, 1993. The complaint against Delta was filed on February 22, 1996. Michelle Fishman alleged claims on the infant's behalf under Article 17 of the Warsaw Convention, as well as claims under New York law for negligence by the stewardess in inflicting the burn, and for the negligent or intentional denial of medical treatment both when the stewardess initially walked away, and later, aboard the plane after landing. Mrs. Fishman also filed claims on her own behalf under New York law for negligent and intentional infliction of emotional distress, and denial of Penina's services. Plaintiffs further assert (for the first time on appeal) an implied cause of action based on Delta's alleged failure to comply with 14 C.F.R. § 121.309(d), which requires an airline to maintain and use first aid kits for the protection of airline passengers.

*2 On September 12, 1996, Judge Cedarbaum granted Delta's motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(5), on the ground of untimeliness. See Fishman v. Delta Air Lines, Inc., 938 F.Supp. 228 (S.D.N.Y.1996). The district court (i) considered the claims of both mother and child as falling within the scope of the Warsaw Convention; (ii) concluded that the two-year period of limitation in Article 29(1) of the Convention cannot be tolled by reason of infancy; and (iii) dismissed on the ground that the complaint was filed after the two-year period had expired. Id. at 230-31.

The chief questions presented on appeal are whether the torts alleged may be construed as arising from an "accident" under the Warsaw Convention and, if so, whether the period of limitation may be tolled during infancy.

DISCUSSION

A. Preemption under Article 17 of the Warsaw Convention: The "Accident" Requirement.

We consider first whether plaintiffs' state law claims are preempted by the Warsaw Convention. See Pflug v. Egyptair

Corp., 961 F.2d 26, 29 (2d Cir.1992). All state law claims that fall within the scope of the Convention are preempted. See In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1273 (2d Cir.1991).

Article 17 of the Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 U.S.C. § 40105 note (emphasis added). A claim falls within the scope of this provision if the "passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." Air France v. Saks, 470 U.S. 392, 405, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). It is enough if in the chain of causation there is "some link " that was an unusual or unexpected event external to the passenger. Id. at 406.

The district court identified the scalding as the "accident" under the Warsaw Convention. On appeal, the plaintiffs cast their claims chiefly in terms of what happened afterward--the tortious refusal of medical care--and argue that such claims do not arise out of the normal operation of aircraft, and in any event are not accidental in nature. Plaintiffs rely on a line of cases in which the tortious failure of airlines to give medical aid to passengers suffering health emergencies was held to fall outside the Warsaw Convention. See, e.g., Abramson v. Japan Airlines Co., 739 F.2d 130, 133 (3d Cir.1984) (preexisting hiatal hernia); Tandon v. United Air Lines, 926 F.Supp. 366, 369-70 (S.D.N.Y.1996) (heart attack); Walker v. Eastern Air Lines, Inc., 775 F.Supp. 111, 114 (S.D.N.Y.1991) (asthma attack); Fischer v. Northwest Airlines, Inc., 623 F.Supp. 1064, 1065 (N.D.Ill.1985) (heart attack).

*3 Judge Cedarbaum distinguished these cases on the valid ground that all the claims asserted on behalf of Penina and her mother arose from the scalding by a flight attendant--an unexpected, unusual event that was external to both Fishmans. Her reasoning, which we approve, was as follows:

> The underpinning of the claims of both mother and child is the scalding of Penina by a flight attendant, an unexpected event that was external to both Fishmans. The precipitating cause, the "accident," cannot be artificially separated from its results as Fishman attempts to do in order to avoid the Warsaw Convention. Because Penina's injuries and Michelle's were caused by an "accident" within the meaning of the Warsaw Convention, the Convention provides the exclusive remedy and the state law claims are preempted.

Fishman, 938 F.Supp. at 230 (emphasis added; citation omitted).

Plaintiffs seize on and dispute the court's observation that "Penina had no pre-existing condition," and point to record facts that Penina suffered serial colds and ear infections, and had narrow eustachian tubes, all of which predisposed her to earache caused by the pressure change of the descent at Orly. However, we agree with Judge Cedarbaum that the injury here is not the earache, but the application of scalding water to treat it. The earache was caused by the change in air pressure, which is part of the normal operation of the plane as it descends, and was not an accident. All the harm alleged by both plaintiffs flows from the scalding, which is easily seen as accidental.

Mrs. Fishman argues that her personal claims are solely for emotional harm and are therefore outside the scope of Article 17. We conclude that these claims for emotional harm are subject to Article 17 nevertheless because the claims arise from an accident--the scalding of her child. As we have already stated, Article 17 premises a carrier's liability on whether "a passenger's injury is caused by an unexpected or

unusual event or happening that is external to the passenger." Saks, 470 U.S. at 405; cf. Tseng v. El Al Israel Airlines, Ltd., --- F.3d ---- (2d Cir.1997) (Warsaw Convention does not cover claim for personal injuries not arising from an accident). However, while all claims resulting from an "accident" are within the ambit of Article 17, not every such claim is compensable. The Supreme Court expressly held in Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991), that damages for purely mental injuries are not recoverable. Id. at 534, 552. Thus, when Mrs. Fishman emphasizes that the only harm she suffered is emotional, she proves too much. Such claims are within the scope of Article 17 and therefore preempted, but she cannot recover any damages for such injuries under Floyd. Cf. In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1273-76, 1282 (2d Cir.1991) (Article 17 permits only compensatory damages, but preempts state law claims for punitive damages). Accordingly, we hold that all of the claims of both Penina and Michelle Fishman are accident claims under Article 17. [FN1]

*4 Our ruling today reinforces the holding in Tseng v. El Al Israel Airlines, Ltd., --- F.3d at ----, a recent decision of this Court. The issue presented in Tseng was whether an invasive but routine security search of a passenger thought to present a possible risk of terrorism could be considered an "accident" covered by Article 17. A panel of this Court held that the search was not such an accident for three interrelated reasons. First, in general, a security search of an international airline passenger is "a routine procedure of international air traffic," id. at ----, and passengers can reasonably expect to undergo such scrutiny when they travel by air. Id. at ----. Second, more specifically, the particular search conducted by the defendant in Tseng was called for by the airline's normal, everyday procedure, and did not deviate from it. Third, the search was incident to the prevention of terrorism, a purpose that the Convention was not intended to derogate.

In sum, Tseng holds that a plaintiff's unusual reaction to a routine and expected incident of airline travel, including any procedure that is conducted in the routine and expected

manner, is no accident within the meaning of the Convention. Thus, an individual nauseated by a bumpy ride or standard airline fare or--as in Tseng--a person squeamish about a pre-flight search, cannot allege an injury resulting from an accident under Article 17. By the same token, a claim does allege an "accident" if it arises from some inappropriate or unintended happenstance in the operation of the aircraft or airline. Thus, an injury resulting from routine procedures in the operation of an aircraft or airline can be an "accident" if those procedures or operations are carried out in an unreasonable manner. (The result in Tseng might have been different had the plaintiff been harmed by an unreasonably rough and invasive search.)

The application of a hot compress to Penina's ear may have been a routine measure for relieving the pain suffered by passengers incident to the descent of the aircraft; but the measure was carried out in a way (using excessive, scalding water) that was not expected, usual, normal, or routine. We conclude that the burning of Penina Fishman (and each of the claims arising from that incident) was an Article 17 accident.

B. Applicability of Local Tolling Provisions to Warsaw Convention Time Limitations.

Plaintiffs' filing of suit more than two years after their flight's arrival in New York exceeds the time limitation fixed in Article 29 of the Convention, subsection (1):

> The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

*5 49 U.S.C. § 40105 note. Plaintiffs contend however that under New York law, the two-year limitations period should be tolled during Penina's infancy, see N.Y. C.P.L.R. § 208 (McKinney 1990), and that such tolling is allowed under subsection (2) of Article 29, which provides:

> The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

49 U.S.C. § 40105 note.

This tolling issue presents a preliminary but not necessarily controlling question as to whether the period is a statute of limitations or a condition precedent. Compare Molitch v. Irish Int'l Airlines, 436 F.2d 42, 43 (2d Cir.1970) (referring to Article 29(1) as a statute of limitations), with Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 443 N.Y.S.2d 79, 87 (2d Dep't 1981) ("[T]he time limitation incorporated in article 29 was intended to be in the nature of a condition precedent to suit."). Ordinarily, a time limitation is deemed a condition precedent if it is fixed in the statute that creates the cause of action, whereas a statutory time limitation must be pleaded as the affirmative defense of statute of limitations if the cause of action was previously cognizable either at common law or by virtue of another statute. See Romano v. Romano, 19 N.Y.2d 444, 447, 280 N.Y.S.2d 570, 227 N.E.2d 389 (1967); Clark v. Abbott Labs., 155 A.D.2d 35, 553 N.Y.S.2d 929, 933 (4th Dep't 1990). We have already held that the Warsaw Convention creates the causes of action asserted under it. See Benjamins v. British European Airways, 572 F.2d 913, 919 (2d Cir.1978) (Lumbard, J.); see also Pescatore v. Pan American World Airways, Inc., 97 F.3d 1, 12 (2d Cir.1996). Accordingly, the time limitation in Article 29 is best termed a condition precedent to suit, a kind of limitation that is often deemed not subject to tolling. See Pearl River Union Free School Dist., 51 N.Y.2d 256, 264, 434 N.Y.S.2d 138, 414 N.E.2d 639 (1980); Dreger v. New York State Thruway Auth., 177 A.D.2d 762, 575 N.Y.S.2d 743, 744 (3d Dep't 1991).

The district court determined that the language of Article 29 was ambiguous, and therefore based its conclusion that tolling was inappropriate on an analysis of the negotiating history of the treaty. Plaintiffs argue that the Warsaw Convention is unambiguous; that it unambiguously allows tolling under the rules of the forum; that these conclusions were

reached by the French Cour de Cassation; and that the construction of the tolling provision by that court is particularly persuasive because the Convention was drafted in French. We reject all of these propositions.

In interpreting the Warsaw Convention, we look first to the literal language of the treaty and go no further if that language is reasonably susceptible to no more than one interpretation. See Tai Ping Ins. Co. v. Northwest Airlines, Inc., 94 F.3d 29, 31 (2d Cir.1996). We agree with the district court that the language of Article 29 is reasonably susceptible to conflicting interpretations. See Fishman, 938 F.Supp. at 230. On the one hand, as plaintiffs argue, the wording in Article 29(2) that leaves to the forum the "method of calculating the period of limitations" could be taken to encompass the forum's tolling provisions. Three district court opinions have so held. See Halmos v. Pan American World Airways, Inc., 727 F.Supp. 122, 123 (S.D.N.Y.1989); Joseph v. Syrian Arab Airlines, 88 F.R.D. 530, 532 (S.D.N.Y.1980); Flanagan v. McDonnell Douglas Corp., 428 F.Supp. 770, 776 (C.D.Cal.1977); see also Royal Ins. Co. v. Emery Air Freight Corp., 834 F.Supp. 633, 635 (S.D.N.Y.1993) ("method of calculating" language "could be interpreted as allowing local statutes of limitations to modify the two-year limitations period"). On the other hand, the same wording can be read merely to invoke the power of the forum court to determine whether the plaintiff accomplished the filing within the limitation period, a question that may involve (for example) the proper party or agent for receipt of process, and the means of service--in other words, matters bearing upon when an action has been "brought." One court has concluded that this is the clear and unambiguous meaning of the Article 29 language. See Data General Corp. v. Air Express Int'l Co., 676 F.Supp. 538, 540 (S.D.N.Y.1988).

***6** Because the language of Article 29 is susceptible to at least two plausible interpretations, we turn to the negotiating history of the Convention to resolve the ambiguity. See Tai Ping Ins. Co., 94 F.3d at 31 (When the text of a treaty is unclear, "[w]e may apply traditional methods of

interpretation."). The Supreme Court has explicitly sanctioned the use of a treaty's legislative history to understand its meaning. See Zicherman v. Korean Air Lines Co., 516 U.S. 217, 116 S.Ct. 629, 634, 133 L.Ed.2d 596 (1996) ("Because a treaty ratified by the United States is not only the law of this land ..., but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux preparatoires) and the post-ratification understanding of the contracting parties."); Saks, 470 U.S. at 396 ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.") (quoting Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943)).

Almost every court that has reviewed the drafting minutes of the Convention, including the district court in this case, has rejected the contention that Article 29(2) incorporates the tolling provisions otherwise applicable in the forum. See, e.g., Castro v. Hinson, 959 F.Supp. 160, 163 (E.D.N.Y.1997); Fishman, 938 F.Supp. at 230; Royal Ins. Co., 834 F.Supp. at 636; Kahn, 443 N.Y.S.2d at 87. The minutes reveal that the drafters of the Convention specifically considered and rejected a proposed provision that would have allowed the limitations period to be tolled according to the law of the forum court. See R.C. Horner and D. Legrez, Minutes of the Second International Conference on Private Aeronautical Law, 110-13 (1975); Kahn, 443 N.Y.S.2d at 86-87; Royal Ins. Co., 834 F.Supp. at 636. As the district court recognized, the main concern of the drafters in rejecting the tolling proposal was "to remove those actions governed by the Convention from the uncertainty which would attach were they to be subjected to the various tolling provisions of the laws of the member states." Kahn, 443 N.Y.S.2d at 87. Moreover, the debates over the language ultimately adopted in Article 29 indicate that the only matter to be referred to the forum court by subsection 2 of Article 29 was "the determination of whether the plaintiff had taken the necessary measures within the

two-year period to invoke that particular court's jurisdiction over the action." Id.

*7 Plaintiffs focus on the minutes of the negotiating session that followed the one in which the drafters discussed and rejected the proposal to amend Article 29 to permit tolling. Plaintiffs say that these minutes raise difficult questions regarding the intent behind Article 29, and the significance to be accorded the rejection of the tolling proposal. These passages from the minutes are far from clear, and they seem hardly relevant. An amendment was proposed that would have expressly allowed what plaintiffs want to do; a reason for rejecting that proposal (the uncertainty of various tolling provisions would frustrate the strict two year limit) was clearly articulated; and the proposal was rejected on the merits. Subsequent statements by individual delegates, however ambiguous, do not alter our understanding of the intent behind the enactment of the language in Article 29. [FN2]

Plaintiffs direct our attention to the decision of France's Cour de Cassation in Lorans v. Air France (Cour de Cassation [Assemblee Pleniere] Jan. 14, 1977). According to treatises cited by plaintiffs (no copy of the opinion was furnished to us), that court ruled that the running of the Article 29 time limitation can be suspended by reason of minority status. According to plaintiffs, the French court reasoned that in order for an international convention to replace municipal law, the text of the convention must unequivocally establish that the ordinarily applicable municipal law must be set aside. Plaintiffs also rely upon the argument articulated by the French First Avocat-General in Lorans, to the effect that since the Warsaw Convention was open to adhesion by states (like the United States) that were not party to the negotiations or the drafting of the text, those nations are bound only by the letter of the text. We are unpersuaded.

The Lorans decision proceeds along lines that are foreign to the principles of treaty construction adopted by our legal system. As we said above, United States courts look to the legislative history of a treaty when the textual language is

ambiguous. Whether or not the United States was a High Contracting Party to the Warsaw Convention has no discernible bearing on the rules of construction set out by the Supreme Court and this Court. See Zicherman, 116 S.Ct. at 634; Saks, 470 U.S. at 396; Tai Ping Ins. Co., 94 F.3d at 31.

Finally, plaintiffs raise for the first time on appeal causes of action based upon defendant's alleged breach of certain rules in the Code of Federal Regulations. These claims were not asserted in the complaint, and were never mentioned at any point in the district court proceedings. We will not consider them now. See Lo Duca v. United States, 93 F.3d 1100, 1104 (2d Cir.) (as a matter of prudence a federal appellate court generally will not consider an issue not passed upon below), cert. denied, --- U.S. ----, 117 S.Ct. 508, 136 L.Ed.2d 399 (1996).

CONCLUSION

***8** The judgment of the district court dismissing plaintiffs' complaint is affirmed.

FN1. We therefore have no occasion to consider whether Mrs. Fishman could recover had she suffered emotional injury coupled with physical injury. The Supreme Court has not specifically addressed this issue, see Floyd, 499 U.S. at 552-53, although some lower courts have permitted such recovery. See In re Inflight Explosion on Trans World Airlines, Inc., 778 F.Supp. 625, 637 (E.D.N.Y.1991) (the implication of Floyd is that psychological injury accompanying physical injury is covered by Article 17) (Weinstein, J.), rev'd on other grounds, 975 F.2d 35 (2d Cir.1992); see also In re Aircrash Disaster Near Roselawn, Indiana, 954 F.Supp. 175, 178-79 (N.D.Ill.1997) (recovery permitted for pre-impact fear if accompanied by physical injury or death in accident); Jack v. Trans World Airlines, Inc., 854 F.Supp. 654, 664-668 (N.D.Cal.1994) (recovery allowed for emotional distress flowing from impact injuries or for emotional distress with physical manifestations).

FN2. We also reject plaintiffs' reliance on the minutes of the 1971 Guatemala City Conference. See generally Floyd, 499 U.S. at 550 (Guatemala City Protocol not dispositive in interpreting Warsaw Convention because the United States Senate has not ratified the Protocol, and only a few of the 120 signatories of the Warsaw Convention have adopted it.)

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